Petition

81-698

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No.

In The

Supreme Court of the United States

OCTOBER TERM, 1981

Francis G. Curcio,
Petitioner,

v.

United States of America
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT WITH APPENDIX

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Questions Presented for Review

1. Does review by a procedure which is summary and which the Court of Appeals states has no precedential value afford adequate appellate review within the meaning of 28 U.S.C. §1291 (1958)?

2. Did the application of the standard that the petitioner, "abused the opportunity not to be incarcerated" under *United States* v. *Nagelberg*, 413 F.2d 708 (2 Cir. 1969), cert. den., 396 U.S. 1010 (1970), so as to preclude the Court of Appeals from measuring the evidence against the specific probation violations alleged, deprive petitioner of due process in violation of *Gagnon* v. *Scarpelli*, 411 U.S. 778, 782, n. 4 (1973)?

3. Is the standard condition of probation, which prohibits probationers from "associating" with non "law-abiding persons," void for vagueness and impermissibly overbroad in violation of the Due Process Clause of the Fifth Amendment?

4. Did the two year sentence imposed by the District Court upon petitioner as a probation violator violate petitioner's original plea bargain that he would only be incarcerated for a maximum of six months, in violation of *Santobello* v. *New York*, 404 U.S. 257 (1971) and 18 U.S.C. §3653 (1948), which provides that a judge, upon sentencing a probation violator, is limited in his sentencing options to those available to the sentencing judge at the time of the probationer's original sentencing?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Francis G. Curcio prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on August 12, 1981.

Opinions Below

The United States Court of Appeals for the Second Circuit rendered its decision on petitioner's appeal on August 12, 1981 and denied his Petition for Rehearing on September 15, 1981. The ruling of the District Court, District of Connecticut, revoking the petitioner's freedom was rendered on October 16, 1980; the District Court's ruling on the legal issues surrounding sentencing was rendered on June 26, 1981. None of these opinions were reported. The District Court's opinions are contained in

the printed record below, which has been certified under Sup.Ct.R. 19 for use here (A. 138; A. 172); the Court of Appeals' ruling is reproduced in the appendix of this petition (3a).[1]

Jurisdiction

The decision of the Court of Appeals is dated August 12, 1981, and its denial of the Petition for Rehearing is dated September 15, 1981. Jurisdiction to review the judgment by writ of certiorari is conferred upon this Court by 28 U.S.C. §1254(1) (1948).

Provisions Involved

18 U.S.C. §3653:

> When directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable.
>
> Whenever during the period of his probation, a probationer heretofore or hereafter placed on probation, goes from the district in which he is being supervised to another district, jurisdiction over him may be transferred, in the discretion of the court, from the court for the district from which he goes to the court for the other district, with the concurrence of the latter court.

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[1] References to materials and documents relevant to the present appeal shall be designated as follows:
To the numbered pages of the Appendix to Petitioner's Appeal to the Second Circuit .....(A.____).
To the numbered pages of the documents constituting the record on appeal to the Second Circuit .....(Doc. #____, p.____).
To the Appendix to Petitioner's Petition for Certiorari, *infra*. (____a).

Thereupon the court for the district to which jurisdiction is transferred shall have all power with respect to the probationer that was previously possessed by the court for the district from which the transfer is made, except that the period of probation shall not be changed without the consent of the sentencing court. This process under the same conditions may be repeated whenever during the period of his probation the probationer goes from the district in which he is being supervised to another district.

At any time within the probation period, the probation officer may for cause arrest the probationer wherever found, without a warrant. At any time within the probation period, or within the maximum probation period permitted by Section 3651 of this title, the court for the district in which the probationer is being supervised or if he is no longer under supervision, the court for the district in which he was last under supervision, may issue a warrant for his arrest for violation of probation occurring during the probation period. Such warrant may be executed in any district by the probation officer or the United States marshal of the district in which the warrant was issued or of any district in which the probationer is found. If the probationer shall be arrested in any district other than that in which he was last supervised, he shall be returned to the district in which the warrant was issued, unless jurisdiction over him is transferred as above provided to the district in which he is found, and in that case he shall be detained pending further proceedings in such district.

As speedily as possible after arrest the probationer shall be taken before the court for the district having jurisdiction over him. Thereupon the court may revoke the probation and require him to serve the sentence imposed, or any lesser sentence, and, if imposi-

tion of sentence was suspended, may impose any sentence which might originally have been imposed.

28 U.S.C. §1291:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Amendment I to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without any due process of law; nor shall private property be taken for public use, without just compensation.

Statement of the Case

Probationer Francis Curcio has been incarcerated for five months for declaring as income on his U.S. tax return, income which he did not earn (A. 33) and has been sentenced to two additional years incarceration as a probation violator for (1) associating with non "law-abiding" persons and (2) traveling to New York from Connecticut to visit his tailor on three occasions without permission of his probation officer (A. 163). From the judgment of the District Court, District of Connecticut, sentencing him to two years incarceration as a probation violator (A. 216), he appealed to the Court of Appeals for the Second Circuit. Having been unsuccessful in that court, petitioner now seeks appellate relief here.

The probation which was found by the trial court below to have been violated, was part of the sentence of imprisonment for three years imposed on June 1, 1977 by the District Court, but "suspended after service...of five (5) months...and...probation for a period of five (5) years...." (A. 62).

The sentence arose from a conviction on a plea of *nolo contendre* to one count of a four-count indictment charging petitioner Curcio with two counts of knowingly and wilfully making and subscribing a U.S. Tax Return which he did not believe to be materially true, in violation of I.R.C. §7206(1), 26 U.S.C. §7026(1) (1954) (A. 65). Petitioner's father, Gustave Curcio Sr., was also named in the indictment in two separate counts, for aiding and abetting petitioner Curcio in violation of I.R.C. §7206(2), 26 U.S.C. §7206(2) (1954) (A. 14-16).

Petitioner Curcio's conviction was the result of a plea agreement with the Government (A. 173). That agreement, on March 22, 1977, resulted in: (1) petitioner's *nolo contendere* plea to count one of the indictment, which alleged that in 1968 he reported as income $4,048.30 which he did not in fact earn and failed to report some smaller, unspecified amount of interest income which he did earn (A. 14, 33-34); and (2) a dismissal of all charges against his father and the remaining count against

petitioner. The sentencing portion of the plea agreement was summarized by the Special Assistant United States Attorney handing the matter as follows:

> "The government will agree to recommend a six-month ceiling of incarceration." (A. 21).

Significantly, petitioner changed his plea and entered into the plea agreement primarily as the result of filial devotion; as explained by petitioner's counsel at the time petitioner's change in plea was accepted by the District Court:

> "...if his father were never joined in this case and were not a defendant, he very well might not be accepting this arrangement." (A. 30).

After serving five months in Allenwood Prison Work Camp beginning June 17, 1977, petitioner Curcio was released on November 1, 1977. He thereafter reported to his probation officer at monthly meetings, the first of which was held on November 3, 1977. At that time, petitioner Curcio signed Probation Form No. 7, entitled, "Conditions of Probation" (A. 68), the significant portions of which read:

> "(2) You shall associate only with law-abiding persons and maintain reasonable hours.
>
> "(4) You shall not leave the judicial district without the permission of the probation officer...."

On September 12, 1978, petitioner's probation officer filed a Probation Form No. 12 with the District Court, seeking to revoke petitioner's probation on the basis that:

> "1. ...probationer...associated with eighteen non-law abiding persons on thirty-two days...all in violation of Condition No. 2 of the Conditions of Probation....

"II. On three separate occasions, without the permission of his Probation Officer, probationer left the Judicial District of Connecticut and traveled into the Southern District of New York...all in violation of Condition No. 4 of the Conditions of Probation...." (A. 138).[2]

Petitioner raised, before the revocation hearings began, several legal issues. Specifically petitioner raised, pretrial, both the facial constitutionality of the "association" condition of probation, Condition Two, and the maximum period of incarceration which could be imposed under the plea agreement, should his probation be revoked (A. 66-67; A. 80). The District Court declined to rule on these issues before the revocation hearing, however, finding that the time was not ripe for their consideration (A. 101, 186).

Evidential hearings were held on the alleged violations of probation in July and August, 1979 (A. 147), after which petitioner renewed some of his earlier legal arguments, all of which were rejected by the District Court. In finding petitioner in violation of his probation, the trial court, in a lengthy opinion (A. 138), specifically found that the association condition was valid on its face (A. 151). After a delay, due partially to petitioner's near death (Doc. #50, p. 1; A.169-171), the District Court subsequently ruled in a second opinion on the sentencing/plea bargain issue. The court held that, notwithstanding the earlier agreement concerning the six month ceiling on incarceration (A. 196), petitioner was eligible for the remainder of the three year sentence imposed and suspended after five months by the original trial court (A. 196). On July 1, 1981, the revoking court imposed a sentence of two years additional incarceration on petitioner (A. 216).

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[2]In fact, petitioner's probation officer filed several Form No. 12s, all alleging, with one exception, violations of Conditions Two and Four. Only the first of the charges brought were considered by the trial court, however (A. 165, n.1).

On appeal to the Court of Appeals for the Second Circuit, petitioner again raised the issue of the constitutionality of the association condition, on its face and as applied, and the legality of the sentence imposed upon him in violation of the plea agreement. The Court of Appeals, in a summary statement of reasons, denied petitioner's appeal, relying in part on the case of *United States* v. *Nagelberg,* 413 F.2d 708 (2 Cir. 1969), cert. den., 396 U.S. 1010 (1970) (4a). Petitioner now seeks review here both as to the manner and content of the Court of Appeals' summary decision.

Reasons for Granting the Writ

This petition presents for review two significant areas in the administration of criminal law in the federal courts: (1) the summary manner of appellate review, now quite common, which was employed by the Court of Appeals to review petitioner's appeal below; and (2) three significant questions dealing with probation revocation passed on summarily by the Court of Appeals. In the first area, the Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision pursuant to Rule 17.1(a) of the Rules of this Court. In the second area, the court below decided the three substantive issues of this petition so as to be in conflict with other circuits and/or to conflict in principle with decisions of this Court, so as to call for review under both Rule 17.1(a) and 17.1(c) of the Rules of this Court.

I. As To The Summary Manner Of Appellate Review.

As has been pointed out by the Circuit Justice for the Second Circuit:

> "The task of interpretation is the cornerstone of the judicial process." Marshall, *The Sword And The Robe,* Vol. 3, Issue 8 The American Lawyer 37 (Aug. 1981).

In the case at bar, the Court of Appeals affirmed the judgment of the District Court with this notation:

> "N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court." (3a).

When an appellate court such as the Second Circuit adopts a widespread policy of formally stating that its opinions have no precedential value — and records indicate the Second Circuit decided approximately sixty-eight percent of its cases either without written statement or by brief summary orders last year (2a)[3] — it in effect abandons, "the task of interpretation...the cornerstone of the judicial process." Such was the type of review petitioner received in the case at bar. What this summary procedure does is to establish a system of second class appellate review in which the Court frankly admits it is unwilling to stand behind its interpretation and reasoning. This new system of review is an abandonment of the traditional development upon which the law is built and is akin to appellate arbitration. The utilization of such a second class system of review undermines the concept of accountability, whereby the courts of appeals have traditionally laid open their reasoning for analysis and scrutiny by other courts. It has a similar effect with regard to the lower courts as well; by providing only summary, non-precedential appellate review, the appeals courts, in effect, render the former's actions similarly impervious to public scrutiny.[4]

What makes petitioner's issue of second class appellate review worthy of this Court's attention is the rising widespread use of the new system by the Second Circuit and the D.C.,

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[3]These statistics are derived from Table 9 of the 1980 Annual Report Of The Administrative Office Of The U.S. Courts, an excerpt from which is reproduced in the appendix to this petition (2a).

[4]The Second Circuit first adopted this type of review in 1973. Local Rule 0.23.

Third, Fourth, Fifth, Sixth, Seventh and Ninth Circuits. Last year only the First, Eighth and Tenth Circuits decided more than half the fully litigated appeals before them with signed opinions(2a).[3] The Second Circuit's use of oral decisions and summary orders, such as the one issued by the Court of Appeals in this case below, has risen approximately forty percent over the past ten years; such decision-making methods were used in approximately twenty-three percent of the cases decided in 1980. Correspondingly, the number of signed opinions issued by the court dropped from fifty-eight percent of the cases decided in 1970 to thirty-one percent of the cases decided in 1980 (1a).[5]

If the reasoning of the court be sound enough to decide petitioner's liberty, that reasoning should be sound enough for lower courts to follow and sound enough to be considered precedent for the deciding court itself. And, on the other hand, if that is not the case, and an opinion is not precedent which can be cited, it is hard to fathom how such a decision qualifies as the "painstaking process of adjudicating actual cases or controversies" which is, after all, the "constitutional task" assigned to judges. Vol. 3, Issue 8, The American Lawyer, *supra*, at 37.

The procedure which petitioner seeks to have reviewed invites the appeals court to shirk:

> "...the solemn responsibility of the federal courts to 'guard, enforce, and protect every right granted or secured by the Constitution of the United States.'" *Kusper* v. *Pontikes*, 414 U.S. 51, 55 (1973).

If review of the procedure challenged here is not granted, the Court of Appeals' dual functions of reviewing errors and announcing and applying principled rules for the future guidance

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[3]These statistics are derived from Table 9 of the 1980 Annual Report Of The Administrative Office Of The U.S. Courts, an excerpt from which is reproduced in the appendix to this petition (2a).

[5]These statistics are derived from Table 4 of the *1980 Report Of The Circuit Executive For The Second Circuit*, which has been reproduced in the appendix to this petition (1a).

of both bench and bar will be diminished. Likewise the system of appellate review itself will be undermined; it has been recognized that, in fact, it is the utilization of formal, articulated opinions by appellate courts which,

> "...gives strength to the system, and reduces, if not eliminates, the easy temptation or tendency to ill-considered or even arbitrary action by those having the awesome power of almost final appellate review." *N.L.R.B.* v. *Amalgamated Cloth. Wkrs. of America, AFL-CIO, Local 990,* 430 F.2d 966, 972 (5 Cir. 1970)

See also *United States* v. *Cruz,* 581 F.2d 535, 541 (5 Cir. 1978), reh den., 587 F.2d 277 (5 Cir. 1978).

Petitioner is not alone in his challenge here. Similar procedures have been criticized by a former solicitor general, a justice of this court (while on the Court of Appeals), and the district judges in at least one circuit (6a).

"Reason is the soul of the law," Coke teaches us. Black's Law Dictionary 1429 (4th Ed. 1951). The summary type of appellate review utilized here goes far towards removing the soul from the law so as to call for an exercise of this Court's power of supervision pursuant to Rule 17.1(a). As this Court has indicated in the past, questions concerning the validity of "unpublished opinion" rules such as the one utilized here have previously been left, "to another day." *Browder* v. *Director, Ill. Dept. of Corrections,* 434 U.S. 257, 258n.1 (1978). Petitioner urges the Court to recognize that that "other day" is now.

II. As To The Three Substantive Questions Presented.

If one takes the Second Circuit's summary review procedure seriously — and it has clearly indicated that it is to be taken seriously, by explicitly stating that its decision are not to be looked at or applied in other cases (3a) — it becomes apparent that such a procedure could well undermine this Court's ability to provide further appellate review pursuant to its certiorari discretion. By failing to provide any sort of binding and detailed analysis of the claims raised in a majority of cases coming before it, the Court of Appeals makes it much more difficult for this Court to

review important questions of law raised below, questions which it has otherwise expressed interest in being able to review under Sup.Ct.R. 17. This case presents such questions, questions which deal with federal probation revocation procedures, an area in which the Court has shown a continuing and keen interest. *Gagnon* v. *Scarpelli,* 411 U.S. 778 (1973); *Wood* v. *Georgia,* _____ U.S. _____, 67 L.Ed.2d 220 (1981).

The questions raised by petitioner here merit review under Rule 17, even though their review has been made more difficult as a result of the new, summary review procedures utilized by the Court of Appeals below. They merit review for the following reasons: (1) the court below applied a standard of review in probation revocation cases based on an outmoded Second Circuit doctrine which is in conflict with a decision of this Court and other circuits; (2) the holding of the court below, insofar as it decided the constitutionality of the standard "association" condition of probation based on its application to petitioner alone, is in conflict with the decisions of this Court and other circuits; and (3) the holding of the court below, upholding the sentencing of petitioner to two additional years incarceration as a probation violator, in violation of the promised six month ceiling on incarceration agreed to at the time of his original sentencing, conflicted with other circuits and the spirit of a controlling decision of this Court.

A. The Court of Appeals relied on a standard of review for probation revocation cases which conflicts, not only with the standards of review adopted in other circuits, but also with a decision of this Court which implicitly has overruled the standard relied on in this case. In keeping with the more summary treatment which it now gives a majority of the cases coming before it, the Court of Appeals upheld the District Court's probation revocation order based on a finding that petitioner had, "abused the opportunity not to be incarcerated" (4a). This standard of review was derived from *United States* v. *Nagelberg,* 413 F.2d 708 (2 Cir. 1969), cert. den., 396 U.S. 1010 (1970), a case which reflected the then generally accepted attitude that

probation was an act of grace which could be revoked, at any time, as a matter of discretion.

Four years after *Nagelberg* was decided, however, this Court pronounced in *Gagnon* v. *Scarpelli* that:

> "...a probationer can no longer be denied due process in reliance on the dictum...that probation is an 'act of grace.'" *Gagnon* v. *Scarpelli, supra,* 411 U.S. at 782, n. 4.

In holding that due process applied to probation revocation proceedings, *Gagnon* implicitly rejected *Nagelberg's* holding that a probationer's freedom could be revoked simply on the basis of a discretionary finding that the probationer had abused the opportunity not to be incarcerated afforded him by probation. Despite *Gagnon,* no new standard of review was ever adopted by the Second Circuit in the probation revocation context.

Moreover, the Court of Appeals' reliance on *Nagelberg* conflicts with post-*Gagnon* standards of review adopted by other federal appeals courts. Since *Gagnon,* the courts in other circuits have held that, to justify the revocation of probation, there must be evidence sufficient to: reasonably satisfy the judge that the probationer's conduct has not been as good as required by the conditions of probation, *United States* v. *Torrez-Flores,* 624 F.2d 776, 781 (7 Cir. 1980); establish that the probationer has, in fact, acted in violation of the conditions of probation, *United States* v. *Reed,* 573 F.2d 1020, 1024 (8 Cir. 1978); establish that probationer has not complied with the conditions of probation, *United States* v. *McLeod,* 608 F.2d 1076, 1079 (5 Cir. 1979); *Banks* v. *United States,* 614 F.2d 95, 100 (6 Cir. 1980); and satisfy the judge that the conduct of the probationer has not met the conditions of probation, *United States* v. *Burkhalter,* 588 F.2d 604, 606 (8 Cir. 1978).

In relying on *Nagelberg,* the appeals court gave summary affirmance to the District Court's revocation order without ever

addressing or even examining whether the evidence adduced against petitioner was sufficient to sustain that order. This was so, despite the fact that that order was based, in part, on evidence which did not even establish that any contact actually occurred between petitioner and some of his alleged "associates" (Doc. #2, pp. 424, 597, 599, 603), the District Court having relied solely on evidence concerning the traffic flow into and out of a multi-roomed building for its finding that petitioner had "associated" in violation of the Condition Two (A. 161-162). Similarly, the reviewing court declined, under *Nagelberg*, to review the evidence or to set out standards as to what constituted nonlaw-abidingness for revocation purposes. The Court of Appeals chose, instead, to summarily affirm the District Court's finding that all individuals with ten year old criminal convictions, whether for misdemeanors or felonies, were prohibited "associates" under the challenged condition (A. 169-170, 167; a). This was so despite the appeals court's own earlier decision, *United States* v. *Albanese,* 554 F.2d 543 (2 Cir. 1977), in which it acknowledged that:

> "A person disobeying the law today and hence not being law-abiding may as yet have no criminal record, and a person with a past record may be entirely law-abiding today." *Id.*, 554 F.2d at 546.

And the court below completely ignored petitioner's plea that it recognize, as one district court has, that:

> "The law-abiding persons condition of probation by its words alone, can be construed plainly to prohibit *only* associations with persons who are engaging in criminal activities at or around the time of the association." *United States* v. *Bonanno,* 452 F.Supp. 743, 756 (N.D. Cal. 1978), *aff'd mem.*, 595 F.2d 1229 (9 Cir. 1979). (Emphasis added.)

The Court of Appeals, then, in utilizing summary appellate review procedures in passing on petitioner's appeal below, adopted and relied upon a standard of review which has been

implicitly overruled by this Court and which conflicts with the standards of review adopted by other federal appeals courts in other circuits, so as to call for an exercise of the Court's power of review pursuant to Rule 17.1(a) and 17.1(c) of the Rules of this Court.

B. Probation Form No. 7, a printed form detailing the standard conditions of probation applicable to all federal probationers, commanded petitioner, "You shall associate only with law-abiding persons..." (Condition Two, A. 68). Petitioner's claim that this "association" condition was vague and overbroad was rejected by the Court of Appeals simply by reference to its earlier decision in *United States* v. *Albanese, supra* (4a).[6]

In *Albanese,* the Second Circuit rejected a similar vagueness attack on the same probation condition, stating:

> "No person 'of common intelligence' in appellant's position, if he gave the words of the condition the interpretation consistent with their 'common usage and understanding,' *Birzon* v. *King, supra,* 469 F.2d at 1243, quoting *Sproles* v. *Binford,* 286 U.S. 374, 393, 52 S.Ct. 581, 76 L.Ed. 1167 (1932), and *Connally* v. *General Construction Co.,* 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926), could reasonably have believed that his pattern of association was allowed by the 'law-abiding persons' condition." *Id.,* 554 F.2d at 547.

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[6]The District Court recognized that, for purposes of Condition Two, the probation officer had included, within the category of prohibited "associations," petitioner's contact with: anyone with either a conviction, an arrest or an involvement "of some sort" with criminal activities absent a conviction (Doc. #3, p. 1080; A.140), no matter what the age of the conviction/arrest/involvement or the nature of the crime involved (A.141); any named individual who was reputed to be a member of the Mafia (Doc. #2, p. 638; A.144); and any specific place named by the probation officer (A. 158-159), and the court approved of the probation officer's actions in doing so (A.157).

Nowhere does the condition state on its face, however, that what is prohibited is contact with persons with criminal records. Yet it is just such an interpretation which was given Condition Two by the probation officer and the District Court below. See n.5, *supra.* The Court of Appeals' adoption of this interpretation, through its affirmance of the District Court's order below, and its conclusion, under *Albanese,* that no person of common intelligence, giving the words of the association condition their common meanings, could reasonably believe that they were allowed to associate with persons with criminal records, simply does not withstand scrutiny. As the *Albanese* court itself recognized, there is a clear distinction between "nonlaw-abiding" and having a criminal record.

> "A person disobeying the law today and hence not being law-abiding may as yet have no criminal record, and a person with a past record may be entirely law-abiding today." *Id.,* 554 F. at 546.

More importantly, *Albanese* as applied by courts below, also conflicts with a decision of this Court. Both courts below said the association condition was not unconstitutionally vague because the probation officer was available for explanations (A. 157, 158; 4a). Aside from the fact that the probation officer rejected the notion that the "law-abiding persons condition...by words alone...can be construed plainly to prohibit *only* associations with persons who are engaging in criminal activities at or around the time of the association," *United States* v. *Bonanno, supra,* 452 F.Supp. at 756,[7] the holding below that specification by the probation officer can clarify the association condition so as to salvage the standard condition from constitutional infir-

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[7]The following testimony by the probation officer made this clear:

"Q. Did you consider that the conviction on a plea of guilty to statutory rape on an event occurring in...April 28, 1945 made him nonlaw-abiding in April of 1978?

"A. Yes, by virtue of the fact that it was a conviction..." (Doc. #3, p. 1088).

mity is contrary to this Court's pronouncement in *Lanzetta* v. *New Jersey,* 306 U.S. 451, 453 (1939); that:

> "If on its face...(a) challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it."

The Court, in *Lanzetta,* found that the statutory language, "know to be a member of a gang," was ambiguous and unconstitutionally vague in that it gave no indication of what constituted "membership" or whether actual or putative association with a "gang" was meant to be proscribed.

Clearly, Condition Two is not so clear and unambiguous on its face as to not require consideration of petitioner's vagueness claims, yet no such consideration was given, under *Albanese,* by the Court of Appeals below.

This Court has recognized that:

> "The vice of unconstitutional vagueness is further aggravated where...(the) statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution." *Baggett* v. *Bullett,* 377 U.S. 360, 372 (1964).

Significantly, the Court of Appeals also relied on *Albanese* to reject, out-of-hand, petitioner's overbreadth challenge to Condition Two as well. The court in *United States* v. *Albanese, supra,* had earlier rejected a similar overbreadth claim against the same probation condition, on the basis that the appellant's conduct, as a probationer, was unprotected, *Id.,* 554 F.2d at 547, and because:

> "Since...the probation condition at issue here can affect *only* appellant (the probationer), and since his conduct could be legitimately proscribed, it would be inappropriate for us to consider whether the condition

might be overbroad on its face." *Id.* (Emphasis added.)

By so relying on *Albanese,* in avoidance of the overbreadth issue, the Court of Appeals placed itself in direct conflict with the decisions of this Court.

It is a fact of life that it takes at least two to "associate"; in limiting probationer's right to "associate," the rights of his potential associates are likewise limited. This was recognized by this Court in *Procunier* v. *Martinez,* 416 U.S. 396 (1974). *Procunier* involved a challenge by state prisoners to mail censorship regulations issued by the California Department of Corrections. Despite the fact that only inmates had been joined as plaintiffs in the suit, the Court refused to decide the case on the basis of the prisoners' First Amendment rights. Rather the Court in *Procunier* realized that:

> "censorship of prisoner mail works a consequential restriction on the First and Fourteenth Amendments right of those (correspondants) who are not prisoners." *Id.*, 416 U.S. at 409.

Therefore, the Court rejected,

> "any attempt to justify censorship merely by preference to certain assumptions about the legal status of prisoners." *Id.*, 416 U.S. at 409.

After finding that the prisoners' constitutional rights were "inextricably meshed" with those of their nonprisoner correspondants, the Court struck down the mail regulations as overbroad, in that they,

> "fairly invited prison officials and employees to apply their own personal prejudices and opinions as standards for prisoner mail censorship." *Id.*, 416 U.S. at 415.

The present case is very close to *Procunier.* Petitioner's First Amendment freedom to "associate" is "inextricably meshed" with the rights of individuals not on probation to be "associates," and *vice versa.* Despite *Albanese* to the contrary — and in *Albanese* there was no reference to this Court's decision in *Procunier* — any condition restricting probationer's freedom to associate does affect the First Amendment rights of nonprobationers as well. Here, as in *Procunier,* therefore, any

> "limitation of First Amendment freedoms (imposed) must be no greater than is necessary or essential to the protection of the particular governmental interest involved." *Id.,* 416 U.S. at 413.

Condition Two is not sufficiently narrow on its terms to assure that it will not be used to overbroadly inhibit the exercise of constitutional freedoms by both probationers and non-probationers. It, like the regulations in *Procunier,* "fairly invites" probation officers, like the one assigned to petitioner (A. 140), and courts to apply their own varying standards under it.

Petitioner's overbreadth claims, therefore, clearly cannot be rejected, as *Albanese* and the Court of Appeals suggest, solely on the basis that Condition Two affects only petitioner's First Amendment rights and therefore presents no significant constitutional question. As reaffirmed so recently here,

> "Because...(petitioner's) claims are rooted in the First Amendment...(he is) entitled to rely on the impact of the ordinance on the expressive activities of others as well as...(his) own. Because overbroad laws, like vague ones, deter privileged activities, our cases firmly establish...(petitioner's) standing to raise an overbreadth challenge." *Schad* v. *Mt. Ephraim,* ____ U.S. ____, 68 L.Ed.2d 671, 679 (1981).

The Court of Appeals, having rejected petitioner's challenges to the association condition by relying on *Albanese,* without recognizing the significant constitutional questions raised,

placed itself in conflict with the decision of this Court in *Schad* and *Procunier* so as to merit review by this Court.

C. No one can gainsay that the original sentence imposed by the original trial court judge, Judge Zampano, was to and did contain a six month ceiling on incarceration. The Government recognized this, "The Government will agree to recommend a six-month ceiling of incarceration" (A. 174); the defense recognized this, "[T]he agreement is that the government will not oppose a setting of a maximum period of incarceration of six months with the defendant reserving the right to argue for less" (A. 176); and the court recognized this, "...the Court would not sentence you to more than six months...." (A. 176). But after petitioner served the five month period of incarceration imposed as part of his sentence of three years, suspended after five months (A. 62), he was nevertheless sentenced to an additional two years incarceration as a probation violator by the second District Court judge involved, Judge Burns. Judge Burns reasoned that since the "original sentence complied with the terms of the agreement" (A. 185), she was not prevented from imposing an additional two years incarceration as the probation violation sentence.

Applying its new expedited appellate review procedure, the Court of Appeals affirmed the District Court on this issue, simply by reference to Judge Barns' opinion (5a). By so doing the court endorsed a decision which is in conflict, in principle, with a decision of this Court and with language used by both the Ninth and Second Circuits, in cases which *do* have a precedent so as to justify review by this Court under Rule 17.1(a) and (c) of the Rules of this Court.

The *maximum* sentencing option available to Judge Zampano under petitioner's plea agreement was three years imprisonment, suspended after six months incarceration, with whatever fine or probation he desired within the statutory limits (A. 21-22; A. 37-39). He in fact sentenced petitioner within the confines of the plea agreement by imposing a three year sen-

tence, suspended after five months incarceration.[8] By subsequently imposing an additional two year sentence on petitioner, Judge Burns clearly indicated that she felt she was not limited in her sentencing options to those available to Judge Zampano; by imposing two years rather than one additional month on July 1, 1981, the District Court apparently felt it was limited with regard to the total period of incarceration, only by the maximum term provided by statute.

Yet both the Second and Ninth Circuits have recognized that a judge resentencing a probation violator under 18 U.S.C. §3653 (1948) has no more sentencing options available to him than those available to and/or utilized by the trial court originally. As explained by the Second Circuit in *United States* v. *Nagelberg, supra,* 413 F.2d 708 — a case the court below, in utilizing its new system of review, cited for a point which this Court has rejected, but ignored on the issue on which it still has vitality:

> "...it seems clear that the probation judge had no more options than the trial judge...." *Id.*, 413 F.2d at 710.

The Ninth Circuit agrees, having vacated the sentence imposed on the defendant in *United States* v. *McDonald,* 611 F.2d 1291 (9 Cir. 1980), where it conflicted with, and was more onerous than, the sentence originally imposed by the trial court. In *McDonald,* the defendant was originally sentenced under the Federal Youth Corrections Act (FYCA) to seven years confinement, suspended after 180 days, five years probation, and a fine. Thereafter, after having been adjudged a probation vio-

---

[8]Petitioner's incarceration is consistent with the action taken by Judge Zampano, who specifically stated at sentencing that he would have imposed a longer period of incarceration but for the plea agreement (A. 184). Yet despite this feeling, he suspended the sentence after five, rather than six, months of incarceration. This enabled Judge Zampano to provide for an additional month—within the ceiling of incarceration—which would be available in event of a violation.

lator, the District Court found the defendant unsuitable for handling under the FYCA and instead imposed a term of three years special parole. *Id.*, 413 F.2d at 1292-3. In vacating the new sentence, the Ninth Circuit, relying on the language in *Nagelberg*, commented:

> "This language [of 18 U.S.C. §3653] was intended to reflect the holding of the Supreme Court in *Roberts* v. *United States*, 320 U.S. 264, 64 S.Ct. 113, 88 L.Ed. 41 (1943), to the effect that having imposed a sentence but suspended its execution during probation, the sentencing court upon revocation of probation could not under the then existing Probation Act set aside the sentence and *increase the term of punishment.* See *United States* v. *Nagelberg*, 413 F.2d 708 (1969." *Id.*, 413 F.2d at 1294. (Emphasis added.)

The summary affirmance, then, of the District Court on this issue by the Second Circuit puts it in conflict with *Nagelberg* and *McDonald*, so as to justify review by this Court.[9]

Moreover, the view taken below hardly squares with this Court's proud boast that, "an essential of the component of the administration of justice," the plea bargain, "must be fulfilled." *Santobello* v. *New York*, 404 U.S. 257, 260-261 (1971). Neither the court, contrary to the procedure of sentencing

---

[9]The leading commentator endorses the *Nagelberg-McDonald* view:

> "(f) Upon revocationi of probation the court should have available the same sentencing alternatives that were available at the time of initial sentencing...." ABA Standards Relating To Probation §1.1, p. 9-10 (1970, Approved Draft).

judges in other cases,[10] the Government, nor anyone else advised probationer at the time of plea or at any other time that, despite the explicit terms of the plea agreement which provided that he would only have to face a maximum of six months incarceration arising out of his *nolo contendere* plea, he could, in fact, be incarcerated up to a total of three years should he subsequently be found in violation of his court-imposed probation. In another case, for example, *but not this one,* the sentencing judge had made such a warning (A. 201-202). This omission from the comments of the sentencing judge in the case at bar is significant. In cases where the original limitation of a plea agreement has been urged at a probation violation sentencing, but denied by the court, a warning as to the effect of a probation violation — unlike the situation here — was given. *State* v. *Williams, supra; State* v. *Fuentes, supra.*

As a matter of law, then, the six month ceiling on incarceration — a key part of the bargain — was not "fulfilled," as *Santobello* commands; the decision of the court below thus conflicts not only with the holdings of other circuits but also with the applicable decisions of this Court, so as to furnish an added ground to merit review here.

---

[10]In *State* v. *Williams,* 593 P.2d 896, 122 Ariz. 146 (1979), for example, the sentencing judge specifically warned the defendant that, should he violate his court-imposed probation, he would face a period of incarceration outside that provided for in his plea bargain agreement. The Court, in discussing with the defendant the statutory penalties applicable to his crime, said:

"Fifteen is the maximum. *In other words, notwithstanding the plea agreement* which calls for County Jail time, if you violate the terms of probation you could be sent to prison for this original charge. Do you understand?" *Id.,* 593 P.2d at 899. (Emphasis added.)

See also *State* v. *Fuentes,* 549 P.2d 224; 26 Ariz. App. 444 (1976).

Conclusion

This petition raises both a broad issue relating to the appellate process utilized by the Second Circuit and more narrow questions concerning the administration of federal probation revocation procedures. Because of the manner of appellate review utilized by the court below, the more narrow questions relating to the validity of federal probation revocation procedures did not receive the scrutiny they deserve. Both areas of the petition are important to the administration of criminal justice.

For these reasons, then, this Court should — and petitioner requests that it does — issue its writ of certiorari to review the judgment of the court below.

Respectfully submitted,

/s/ Jacob D. Zeldes
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October, 1981

No.

In The

Supreme Court of the United States

OCTOBER TERM, 1981

Francis G. Curcio,
Petitioner,

V.

United States of America
Respondent.

APPENDIX

Table 4

Method of Rendering Decision in Cases
Terminated After Oral Hearing or Submission

Year	Total Terminations	Total Decisions	Signed Opinion	Per Curiam	Oral Decision and Summary Order
1970	1,177	660	381	126	153
1971	1,571	951	518	162	271
1972	1,593	897	489	154	254
1973	1,462	797	365	78	354
1974	1,819	819	336	97	386
1975	1,808	783	364	91	328
1976	1,947	897	407	87	403
1977	2,093	1,026	399	73	554
1978	1,888	921	349	44	528
1979	2,088	977	294	71	612
1980	2,156	1,043	325	64	654

1980 REPORT OF THE CIRCUIT EXECUTIVE FOR THE SECOND CIRCUIT, P. 31.

Table 9

Opinions and Other Papers Filed in Cases Disposed of in the United States Courts of Appeals During the Twelve Month Period Ended June 30, 1980

Circuit	Total Cases Terminated	Disposed of After Oral Hearing or Submission of Briefs			
		Total	Signed	Reasoned	Other
Total	20,887	10,607	4,209	4,954	1,444
District of Columbia	1,420	501	218	98	185
First	669	363	273	47	43
Second	2,214	1,052	334	679	39
Third	1,769	818	253	69	496
Fourth	2,242	861	225	628	8
Fifth	3,810	2,359	996	948	415
Sixth	1,832	1,085	220	834	31
Seventh	1,497	798	297	485	16
Eighth	983	597	325	220	52
Ninth	3,177	1,308	537	668	103
Tenth	1,274	865	531	278	56

Excerpt from Table 9, 1980 ANNUAL REPORT OF THE DIRECTOR OF ADMINISTRATIVE OFFICE OF THE U.S. COURTS, p. 211. Omitted are the statistics dealing with total case consolidations and cases disposed of without oral hearing or submission on briefs.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York the Twelfth day of August, one thousand nine hundred eight-one.

PRESENT: Honorable Thomas J. Meskill, *Circuit Judge,*
Honorable Amalya L. Kearse, *Circuit Judge,*
Honorable Howard T. Markey,* *Chief Judge,*
United States Court of Customs and Patent Appeals

UNITED STATES OF AMERICA,
Appellee,

v. Docket No. 81-1275

FRANCIS G. CURCIO,
Appellant.

This is an appeal from a judgment of the United States District Court for the District of Connecticut, Burns, *J.*, sentencing probationer Francis Curcio to two years incarceration as a probation violation. On June 1, 1977 Judge Zampano sentenced Curcio to imprisonment for three years, suspended after five months and probation for a period of five years, after a conviction on a plea of *nolo contendere* to one count of a four-count indictment of a violation of 28 U.S.C. § 7206. The probation form that Curcio read and signed contained the statement, "You shall associate only with law-abiding persons" and "you shall not leave the judicial district without the permission of the probation officer."

*Honorable Howard T. Markey, Chief Judge, United States Court of Customs and Patent Appeals, sitting by designation.

The district court revoked probation after finding that on numerous occasions Curcio violated the travel condition and the association provision imposed by his probation officer.

The appellant claims that the court below erred in concluding that his conduct warranted revocation of probation. A review of the record, however, indicates that the court's conclusion that the probationer abused the opportunity not to be incarcerated is supported by the evidence, *United States* v. *Nagelberg*, 413 F.2d 708, 709 (2d Cir. 1969).

Appellant Curcio claims that the association condition of probation is unconstitutionally overbroad and void for vagueness. We rejected the same argument in *United States* v. *Albanese*, 554 F.2d 543 (2d Cir. 1977). Curcio had access to his probation officer for clarification of the terms of his probation if he felt the need for clarification. The district court correctly held that the frequent associations with non-law-abiding persons represented a calculated choice by the probationer. As in *Albanese*, "no person of common intelligence could reasonably have believed that his conduct conformed to the conditions of probation.

Curcio also claims that the travel ban condition is unconstitutional on its face. He does not challenge the court's finding that on numerous occasions he willfully violated the travel condition imposed. The constitutional claim must fail. The requirement of prior approval for travel outside of the district was not a ban. Curcio was never denied permission to travel to New York. He just did not seek permission before going there on the dates in question.

Curcio also claims that the conduct of the probation officer warranted dismissal of the probation violation charges. Judge Burns did not examine the written material submitted by the probation officer and complained of by Curcio, nor did she consider the organized crime references in reaching her decision to revoke probation. Thus, appellant was not prejudiced by the alleged misconduct of the probation officer.

Appellant also claims that his sentence for violating probation exceeds the bargain struck at the time of his *nolo contendere* pleas. We find no merit in this argument for the reasons spelled out in Judge Burns opinion below.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said district court be and it hereby is affirmed.

Thomas J. Meskill, *Circuit Judge*

Amalya L. Kearse, *Circuit Judge*

Howard T. Markey, *Chief Judge, U.S. Court of Customs and Patent appeals*

Critics of the new appellate procedures utilized by the Second Circuit here and by other appeals courts in other circuits include:

1. Former Solicitor General Dean Griswold. In an appearance before the Commission on Revision of the Federal Court Apellate System, Dean Griswold testified that he believed at least one court was utilizing the new procedures to both conceal and suppress conflict among its judges and to avoid *en banc* reconsideration of decisions. He also indicated that, in his belief, utilization of no-publication/no-precedent decisions resulted in different panels handing down conflicting decisions within the court. Vol. 1 Phase 1 Hearings Before The Commission On Revision Of The Federal Court Appellate System 10, 468.

2. Justice Stevens. While a judge on the Court of Appeals for the Eighth Circuit, Justice Stevens, in an address to the Illinois State Bar Association, commented:

> "...(A) rule which authorizes any court to censor the future citation of its own opinions or orders rests on a false premise. Such a rule assumes that an author is a reliable judge of the quality and importance of his own work product. If I need authority to demonstrate the invalidity of that assumption, I refer you to a citizen of Illinois who gave a brief talk in Gettysburg, Pennsylvania that he did not expect to be long remembered. Judges are the last persons who should be authorized to determine which of their decisions should be long remembered." Address to the Illinois State Bar Association's Centennial Dinner, Springfield, Illinois, January 22, 1977.

3. District Court Judges. According to Judge Coffrin of the First Circuit Court of Appeals, the District Court judges in at least one circuit have formally protested the appeals courts' use of unpublished opinions. 1976 Annual Report On Operation Of Circuit Opinion Publication Plans, Administrative Office of U.S. Courts.

These individuals and their comments illustrate the types of concerns expressed by both bench and bar regarding the new appellate review procedures adopted and utilized by the Second Circuit in the present case.

Supplemental Brief

Office - Supreme Court, U.S.
FILED
OCT 29 1981
ALEXANDER L. STEVAS
CLERK

NO. 81-698

In The

Supreme Court of the United States

OCTOBER TERM, 1981

FRANCIS G. CURCIO,
Petitioner,

V.

UNITED STATES OF AMERICA
Respondent.

SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT WITH SUPPLEMENTAL APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

Petitioner supplements Question No. 1 in the original Petition for Writ of Certiorari by substituting the following for the original Question No. 1 presented.

1. Does review by a procedure which is summary and which the Court of Appeals states has no precedential value in accordance with Second Circuit Court Rule 0.23 afford adequate appellate review within the meaning of 28 U.S.C. §1291 (1958) or deny rights guaranteed by the First Amendment?

ADDITIONAL REASON FOR GRANTING THE WRIT

Wholly apart from the defects in the Second Circuit's non-published opinion rule, as discussed in the original petition, the Second Circuit rule raises troubling concerns in the light of the First Amendment. The rule limits the ability of litigants, attorneys, and the public to acquire information about the performance of the judiciary and the judiciary's role in resolving specific disputes. It also imposes a barrier to First Amendment rights by undermining the ability to usefully disseminate this information even if it is somehow acquired.

Therefore, if Question No. 1 concerning the Second Circuit's unpublished opinion rule prompts this Court to grant review, that procedure should be reviewed not only in connection with whether the rule permits an appropriate appellate procedure, as stated in the original petition, but also in the light of the First Amendment.

CONCLUSION

For these reasons, and for the reasons advanced in the Petition, this Court should — and Petitioner requested that it does — issue its writ of certiorari to review the judgment of the Court below.

Respectfully submitted,

/s/ Jacob D. Zeldes
Jacob D. Zeldes, Counsel of Record

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October, 1981

NO. 81-698

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SUPPLEMENTAL APPENDIX

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UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA :

V. : CRIMINAL NO. B-74-48

FRANCIS G. CURCIO :

MEMORANDUM OF DECISION

The issue before the Court in this probation revocation proceeding is whether Probationer Francis G. Curcio violated Condition No. 2 (the association condition) and Condition No. 4 (the travel condition) of his Conditions of Probation. Both conditions were included in Probation Form No. 7 which Probationer Curcio read and signed on November 3, 1977. The form provides that:

> It is the order of the Court that you shall comply with the following conditions of probation:
>
> (1) . . .
>
> (2) You shall associate only with law-abiding persons. . .
>
> (3) . . .
>
> (4) You shall not leave the judicial district without the permission of the probation officer. . .

On September 12, 1978, Probation Officer David Pond, the supervising probation officer, filed Probation Form No. 12 charging that:

> I. From November 1977 through April 1978, Probationer Curcio is alleged to have associated with eight-

een non-law abiding persons on thirty two dates. . . all in violation of Condition No. 2 of the Conditions of Probation. . .

II. On [illegible]ree separate occasions, without the permission of [illegible]is Probation Officer, probationer left the Judicial District of Connecticut and traveled into the Southern District of New York,. . . all in violation of Condition No. 4 of the Conditions of Probation. . .

It is for these alleged violations[1] that the government seeks to have the court revoke probation pursuant to 18 U.S.C. §3651.[2]

Probationer Curcio seeks dismissal of the charges against him on the grounds that: (1) probation officer Pond's conduct was prejudicial, or at least created an appearance of impropriety, which denied him due process of law under the Fifth Amendment of the United States Constitution or which requires the court to exercise its supervisory powers over the probation office; (2) the association condition is unconstitutional on its face under the First and Fifth Amendments of the United States Constitution; (3) the association and travel conditions are unconstitutional as applied under the Fifth Amendment; and (4) the Government has failed to prove that probationer violated the association condition or wilfully violated the travel condition. For the reasons stated below the court finds that probation officer Pond's conduct did not prejudice the probationer, that the association condition is constitutional under the First and

---

[1]Probation Officer Pond subsequently filed four additional Form 12's against the probationer. Because they were filed after Mr. Pond was removed from active supervision of the case, the Court is not considering them in determining whether Mr. Curcio violated the terms of his probation.

[2]§3651 Suspension of Sentence and Probation.

The court may revoke or modify any condition of probation, or may change the period of probation.

Fifth Amendments, that the association and travel conditions are constitutional as applied under the facts of this case, and that probationer Curcio knowingly and wilfully committed acts which violated both conditions of his probation.

On March 22, 1977, probationer Curcio entered a plea of *nolo contendre* to one count of a four count indictment charging him with two counts of knowingly and wilfully making and subscribing a United States Tax Return which he did not believe to be materially true, in violation of 26 U.S.C. §7206. In exchange for his plea, the government agreed to dismiss the remaining count against probationer and the two counts against probationer's father. The government further agreed to recommend a six-month maximum period of incarceration. On June 1, 1977, Judge Zampano of this district sentenced Mr. Curcio to three years' imprisonment, suspended after service in a prison or jail for a period of five months, followed by a five-year period of probation. Probationer began serving his sentence on June 17, 1977, and was released on November 1, 1977.

As part of Mr. Curcio's probation, he was required to meet with Probation Officer Pond on a monthly basis. Their first meeting occurred on November 3, 1977, at which time Curcio read and signed Probation Form No. 7 which contained the conditions of probation presently in issue, and Pond explained these conditions to him. Pond told Curcio, with respect to Condition 2, that:

> A person the probation officer considers nonlaw-abiding would be those individuals that have criminal records, those individuals who are involved in ongoing criminal activities who may not have a criminal record, those on probation [or] parole, unless he had the permission of the probation office.

(Tr. July 30, 1979, 66). Pond also explained that:

> if he was associating with a person who fell into any of these categories that he should come to us and dis-

> cuss the matter and find out if he could get permission to associate and have a relation of some kind with the particular person.

(Tr. July 30, 1979, 72). To help clarify the association condition, Pond referred Curcio to two cases, *United States* v. *Albanese,* 554 F.2d 543 (2d Cir. 1977), and *United States* v. *Conte,* Cr. No. H-299 (D. Conn., judgment entered Jan. 31, 1978). As to the probation violation in the *Albanese* case, Pond stated that:

> the facts appeared to be based on a pattern of association over an extended period of time with many, many individuals who had criminal records.

(Tr. July 30, 1978, 77). The probation officer distinguished *Albanese* from *Conte* by explaining that:

> Mr. Conte was in violation of association on the basis of two separate arrests and the association relating to those arrests...[Charges were] brought on the basis of the arrest information, of the fact of arrest... Conte was also charged similarly with association with nonlaw-abiding citizens and that the basis for that was that these individuals Mr. Conte had been with [on those two occasions] had had criminal records.

(Tr. July 30, 1979, 58-59). After explaining both cases, Mr. Pond had Mr. Curcio read a newspaper article which appeared in the Bridgeport Post on November 7, 1976. (Tr. July 30, 1979, 60; August 3, 1979, 619). The article reported that Salvatore Albanese's parole had been revoked because he had associated with "known criminals" in violation of the requirement that probationer "associate only with law-abiding persons." It indicated that there had been testimony that Albanese had been seen in the company of members of organized crime on more than fifty occasions. Although Albanese argued that most of those cited had been his friends since boyhood, the newspaper stated

that the judge was not convinced that those ties were his only alternative or that he had moved towards the law-abiding citizens of his community. After reading the article, Mr. Curcio said that "he understood it completely." (Tr. July 30, 1979, 60). No distinction was made by Mr. Pond either as to the age of a conviction or as to the nature of a crime. Nor were any references made to specific individuals. (Tr. July 30, 1979, 73).

With respect to Condition No. 4, Mr. Pond told probationer on November 3 that "he had to have prior approval from [the Probation] office to travel...out of the state of Connecticut." (Tr. July 30, 1979, 61). However, because Mr. Curcio indicated that he had a full-time job as a salesman with Honeyspot Motors in Bridgeport, Connecticut, which required interstate travel to New York, New Jersey and Florida, the probation officer agreed to "take up the matter of his employment and the need to travel out of state for employment with [his] supervisor and [then advise probationer] of any decision. From that, it was left that for any other reasons he would need a prior approval before going out of state." (Tr. July 30, 1979, 62). Probationer also told Mr. Pond that he traveled out of state to visit his girlfriend in New York and vacation in Florida, and that he thought that "the requirement to obtain prior approval seemed unreasonable, especially for his employment." (Tr. August 3, 1979, 623).

On November 8, 1977, Mr. Pond spoke with Mr. Zeldes, counsel for the probationer, on the telephone about what he had related to Mr. Curcio in regard to the travel and association conditions, including their discussion of *Albanese* and *Conte*. Mr. Curcio was present with Mr. Zeldes during the conversation. At this time Mr. Pond made the first exception to the association condition by permitting probationer to associate with his brother Gus, a convicted felon, for a social or family gathering. (Tr. August 3, 1979, 626-628). Permission to associate with Gus for business purposes was granted at a later date. (Tr. August 16, 1979, 1234).

From December 6, 1977 through September 14, 1978, Mr. Curcio met monthly with Mr. Pond and spoke regularly to him on the telephone. Both conditions were frequent topics of conversation. Although permission was subsequently granted for Curcio to travel out of state for employment purposes with the condition that he submit a list of the places to which he traveled, out of district travel for other purposes still required prior approval and the issuance of a permit. (Tr. August 2, 1979, 644). Despite this restriction, Mr. Curcio rarely sought prior permission before visiting his tailor in New York to purchase special large sized clothing, and he never obtained a permit. Instead, he usually reported his visits after the fact. This was so even though Pond had told him on at least six occasions that he needed prior approval and a permit.[3] Probationer's responses to Mr. Pond's reminders consisted of assertions that "other probationers [did] not [have] to obtain travel permits to go out of state.... [A]ll they did was call up and get permission," (Tr. August 3, 1979, 640), or, that he thought that he had "prior permission" or "blanket permission" to travel to the tailor in New York. (Tr. August 3, 1979, 682; Tr. August 6, 1979, 702; Tr. August 16, 1979, 1200). Based on verbal information from the F.B.I., Mr. Curcio's traveling status was altered on June 2, 1979 to limit out of state travel to employment purposes. (Tr. August 3, 1979, 684-685). On June 20, 1979, probationer's request to permit travel to the tailor was denied in writing. (Tr. August 16, 1979, 1208).

At the same time that Mr. Pond was clarifying Mr. Curcio's travel conditions he was also placing specific restrictions on and making limited exceptions to Mr. Curcio's associations. On December 6, 1977, Mr. Pond prohibited probationer from associating with Vincent Pollina, Thomas Vastano, Louis Mastro

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[3]These conversations occurred on Dec. 6, 1977, (Tr. August 2, 1979, 636); February 14, 1978, (Tr. August 2, 1979, 656, 657); May 2, 1978, (Tr. August 3, 1979, 681); May 22, 1978, (Tr. August 3, 1979, 682); June 2, 1978 (Tr. August 3, 1979, 687); June 6, 1978 (Tr. August 6, 1979, 702).

and Louis Varvella, (Tr. August 2, 1979, 637, 638; Tr. August 6, 1979, 705), and informed him that Mastro and Varvella had been told that they were in violation of their probation by frequenting the Main Street Social Club located above Ben's Auto Sales and by associating with the same people. (Tr. August 3, 1979, 637).[4] Mr. Pond explained to Mr. Curcio that he was prohibited from having contact with Mr. Pollina because he was a named member of the Mafia. (Tr. August 2, 1979, 637, 638). When probationer asked if Mr. Pollina was a felon, Pond advised him that Pollina had been arrested and convicted and may possibly be a felon, (Tr. August 3, 1979, 638), and that in any event "it made no difference [because he] had a conviction record, and whether or not it was a felony conviction was not the standard." (Tr. August 16, 1979, 1245). The probation officer suggested that Mr. Curcio discuss the matter with his attorney if he felt that this was unjustified. (Tr. August 3, 1979, 638). Finally, Mr. Pond reiterated that "if a pattern of criminal association is determined over an extended period of time, he could very well face probation violation proceedings on that technical violation." (Tr. August 3, 1979, 638-639).

On January 17, 1978, Mr. Pond prohibited Mr. Curcio from associating with Chris Mengoulis based on Mr. Mengoulis' criminal record. When Mr. Curcio told Mr. Pond that Mengoulis did not have a felony conviction record, Mr. Pond responded that "Mengoulis had a conviction record, criminal conviction record, and that if he had any questions, to take it up with Mr. Zeldes." (Tr. August 3, 1979, 645). Two weeks later, Mr. Zeldes was informed by Mr. Pond of both the Pollina and Mengoulis prohibitions and of continuing associations between Mr. Curcio and Mr. Mengoulis. (Tr. August 3, 1979, 645-647).

On March 14, 1978, Mr. Pond granted Mr. Curcio permission to stop in "occasionally" for a drink with Frank Messinger at

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[4]It is unclear whether Mr. Pond actually told Mr. Curcio that he was prohibited from visiting the club. See Tr. August 3, 1979, 637 and Tr. August 6, 1979, 705.

Mr. Messinger's restaurant. (Tr. August 3, 1979, 660), even though Mr. Messinger was a convicted felon and had been incarcerated with Mr. Curcio at Allenwood Prison in Pennsylvania (Tr. August 16, 1979, 1219). The following day Mr. Pond visited Mr. Curcio at home to clarify what he meant by "occasionally." (Tr. August 3, 1979, 661). Mr. Pond agreed to permit the contact after discussing it with his supervisor because "it was a public restaurant and there seemed to be nothing wrong with Mr. Curcio occasionally stopping into this restaurant and having a drink, and if Mr. Messinger happened to be there, that he could say hello to him. He certainly was not given permission to discuss anything with Messinger, plan to meet him there or to associate in any fashion with him." (Tr. August 16, 1979, 1248-1249).

Mr. Pond similarly made no objection to probationer's seeing David Iacovetti, a federal parolee, while dining at a restaurant in Bridgeport, because "on the basis of the information Mr. Curcio provided to [him] regarding the incident, the clear indication was that it was a chance meeting that he happened to see Iacovetti at the Spindletop Restaurant. There was no indication that he discussed anything with Iacovetti, that he sat down with him or it was a planned meeting of any kind." (Tr. August 16, 1979, 1247).

On May 22, 1978, Mr. Pond again asked Mr. Curcio if he had any questions about the association and travel conditions. Mr. Curcio replied that:

> he fully understood each and every one of the conditions. [Probationer] said that he stopped by the club on North Main Street that — runs a couple of times a week, but just for short periods.

(Tr. August 3, 1979, 681). Mr. Pond then advised him that:

> he has been fully informed as to the area of association and that his frequenting of that club,. . . .could be grounds for probation violation. . .

(Tr. August 3, 1979, 681).

On June 2, 1979, Pond advised Curcio that within a few weeks documentation was going to be submitted relative to violations of the travel and association conditions. (Tr. August 3, 1979, 684). Formal charges were filed by Pond on September 12, 1978 in Probation Form No. 12 based on information received from F.B.I. surveillances. As indicated above, Pond charged that Curcio associated with eighteen non-law abiding persons on thirty-two dates. Eighteen of these associations were alleged to have occurred at the Pizza Village Restaurant in Bridgeport, Connecticut, ten at the North Main Street social club located above Ben's Auto Sales in Bridgeport, Connecticut, three at Honeyspot Motors in Stratford, Connecticut and one at Honeyspot Diner in Stratford, Connecticut. Curcio was also charged with traveling to the Southern District of New York on three occasions without permission. Pond was removed from active supervision of the case on September 14, 1980.

Preliminary to the present probation revocation hearing, Judge Zampano denied probationer's motion to dismiss Probation Forms 12 or in the Alternative, to Clarify the Conditions of Probation, with leave to renew; postponed a decision as to what the period of incarceration would be if there were a violation of probation; and reserved decision on a motion challenging Probation Officer Pond's conduct. A probation revocation hearing was held before Judge Burns on July 30 and 31, August 2, 3, 6, 10, 15 and 16, and September 29, 1979. At the hearing, the Government called thirteen witnesses to testify concerning each alleged violation. The defendant called one witness. All witnesses were subjected to rigorous cross examination. On March 13, 1980, oral arguments were heard on probationer's motion to dismiss the charges filed against him by Mr. Pond.

I

Probationer Curcio's first allegation is that probation officer Pond's conduct both before and after probationer's sentencing and during and after the period of Pond's supervision was prejudicial, or at least created an appearance of impropriety, which denied him his Fifth Amendment right of due process of law

under *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973). Specifically, probationer charges that Pond acted improperly by (1) referring to organized crime in the presentence report, (2) repeatedly submitting reports to the judges presiding at the probation revocation proceedings, and (3) communicating with the press during the hearings. While probation officer Pond may not have used his best judgment in performing his duties under Rule 32(c)(2) of the Federal Rules of Criminal Procedure, 18 U.S.C. §3577 and 18 U.S.C. §3655,[5] the court cannot agree that his conduct

[5]Rule 32. Sentence and Judgment

(c) Presentence Investigation

(2) Report. The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court.

As Amended July 31, 1975, Pub. L. 94-64, 03(31-(34), 89 Stat. 376.

§3577. Use of information for sentencing

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

Added Pub. L. 91-452, Title X, §1001(a), Oct. 15, 1970, 84 Stat. 951.

§3655. Duties of probation officers

The probation officer shall furnish to each probationer under his supervision a written statement of the conditions of probation and shall instruct him regarding the same.

in any way prejudiced the probationer so as to deny him due process of law.

In *Gagnon* v. *Scarpelli, supra,* the Supreme Court recognized that the loss of liberty entailed in the revocation of probation is a serious deprivation requiring that the probationer be afforded due process. Perceiving no difference between the revocation of parole and the revocation of probation, the Court held that due process requires that a probationer be given a preliminary and final revocation hearing under the conditions specified in *Morrissey* v. *Brewer,* 408 U.S. 471 (1972). In *Morrissey, supra,* the court set forth the following minimum requirements applicable to the final revocation hearing:

(a) written notice of the claimed violations of parole;
(b) disclosure to the parolee of evidence against him;

He shall keep informed concerning the conduct and condition of each probationer under his supervision and shall report thereon to the court placing such person on probation.

He shall use all suitable methods, not inconsistent with the conditions imposed by the court, to aid probationers and to bring about improvements in their conduct and condition.

He shall keep records of his work; shall keep accurate and complete accounts of all moneys collected from persons under his supervision; shall give receipts therefor, and shall make at least monthly returns thereof; shall make such reports to the Director of the Administrative Office of the United States Courts as he may at any time require; and shall perform such other duties as the court may direct.

Each probation officer shall perform such duties with respect to persons on parole as the Attorney General shall request.

June 25, 1948, c. 645, 62 Stat. 843.

> (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact-finders as to the evidence relied on and reasons for revoking parole.

408 U.S. at 489. The court further emphasized that revocation of parole was not a part of a criminal prosecution which would entitle a parolee to the full panoply of rights due a criminal defendant:

> It is a narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other materials that would not be admissible in an adversary criminal trial.

408 U.S. at 480, 489.

Probationer Curcio does not question the adequacy of notice, the disclosure of the evidence against him, his opportunity to be heard or his right to confront witnesses. Instead, he asserts that Mr. Pond's behavior was inherently prejudicial. This claim might be interpreted as suggesting his right to a "neutral and detached hearing body" has been subverted. Since even in a trial situation "the alleged bias and prejudice [of the trier] to be disqualifying must stem from an extrajudicial source *and* result in an opinion on the merits *on some basis other than what the judge learned from his participation in the case,*" *United States* v. *Grinnell Corp.*, 384 U.S. 563, 582 (1966), (Emphasis added), the Court cannot agree that the mere appearance of impropriety is sufficient to warrant dismissal. See also *United States* v. *Sclafani,* 487 F.2d 245, 255 (2d Cir. 1973). Nor can it agree that Officer Pond's extrajudicial conduct resulted in an opinion on

the merits on some basis other than what was learned from its participation in the case.

Throughout the sentencing and revocation proceedings both Judge Zampano and this Court made every effort to avoid considering any information which could even possibly rejudice the probationer. At sentencing Judge Zampano, in refusing to give any weight to the references which Mr. Pond made to organized crime, stated:

> ...I am not giving any consideration to the allegations of membership in organized crime. This is not because these allegations should not...be considered or are improperly in the pre-sentence report. The Court does find that the probation officer was very careful to put in whatever evidence there was to support those allegations. On the other hand, this Court has written extensively on the dangers of hearsay allegations of organized criminal activity, and for the reasons stated in those opinions that have been published, and for the reasons stated by Mr. Zeldes, the Court will not, for the purposes of this sentencing, consider those allegations. I wipe them completely out of my mind and take them off the scale....

(Tr. June 1, 1977, 16).

As far as this Court is concerned, the court has not considered the products of Mr. Pond's somewhat overzealous conduct. This Court solely bases its decision on Form No. 12 filed on September 12, 1978, the record of the nine day hearing, the attorneys' briefs and the oral argument.[6] The Court has not read any of the other materials submitted by Mr. Pond or considered the organized crime references or the newspaper stories.

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[6]The Court conducted an extensive hearing lasting nine days and amounting to 1,500 pages of transcript. Probationer's brief and reply brief together amounted to over 300 pages.

Because the Court finds that it is not prejudiced under the standards articulated in *Grinnell, supra,* and that Mr. Curcio was not denied due process of law, the Court declines to dismiss the charges filed against Mr. Curcio in Probation Form No. 12 filed on September 12, 1978 pursuant to either the Fifth Amendment or its supervisory powers over federal officers.

II

Probationer next contends that the associaton condition is unconstitutional on its face under the freedom of association protection of the First Amendment of the United States Constitution and the void for vagueness doctrine of the due process clause of the Fifth Amendment of the United States Constitution. He also maintains that both the association and travel conditions of his probation are unconstitutional as interpreted and applied to him in the present case, thereby violating fundamental fairness and due process under the Fifth Amendment. In support of the latter he asserts that (1) the probation officer's interpretation of the conditions was overbroad and irrational, (2) that application of the conditions was not reasonably related to his underlying conviction, conduct which is criminal, and the danger of future criminality, and (3) that the probation officer's explanations of the association condition failed to give him fair notice of what conduct was to be prohibited. The Court finds these contentions to be meritless.

Under 18 U.S.C. §3651,[7] the district judge has wide discretion in imposing conditions of probation. These conditions, like

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[7] §3651. Suspension of sentence and probation

> Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and condition as the court deems best

conditions of parole, can restrict the activities of those on probation substantially beyond the normal restrictions imposed by law on ordinary citizens. *Morrissey* v. *Brewer*, 408 U.S. at 478. The only limitation placed on the court in setting such conditions and the probation officer in implementing them is that the restrictions be "reasonably and necessarily related to the advancement of some justifiable purpose of imprisonment," *Birzon* v. *King*, 469 F.2d 1241, 1243 (2nd Cir. 1973) and that they bear "a reasonable relationship to the treatment of the accused and the protection of the public." *United States* v. *Pastore*, 537 F.2d 675, 681 (2nd Cir. 1976). The court and the probation officer need not, as probationer insists, limit the conditions to those which are reasonably related to the underlying conviction, conduct which is criminal and the danger of future criminality. See *In re White*, _____ Cal. _____, 26 Crim. L. Rptr. 2098, 2099 (Cal. Ct. App., 5th Dist. 1979) (Interpretation of California Penal Code §1203.1). As stated by the court in *United States* v. *Consuelo-Gonzalez*, 521 F.2d 259, 264 (9th Cir. 1975):

> The guiding principal which has emerged in construing the Probation Act is that the only permissible conditions are those that, when considered in context, can reasonably be said to contribute significantly both to the rehabilitation of the convicted person and to the protection of the public...this must be a very flexible standard. Nor could it be otherwise in light of the uncertainty on how rehabilitation is accomplished.

(citations omitted). See also *United States* v. *Tonry*, 605 F.2d 144, 148 (10th Cir. 1979); *United States* v. *Furukawa*, 596 F.2d 921, 923 (9th Cir. 1979); *Porth* v. *Templar*, 453 F.2d 330, 333 (10th Cir. 1971).

Both the condition that "You shall associate only with law-abiding persons" and the condition that "You shall not leave the judicial district without the permission of the probation officer..." are among the standard conditions typically imposed on probationers and parolees. *Morrissey* v. *Brewer*, 408 U.S. at

478. These conditions are reasonably and necessarily related to the government's legitimate probation objectives, *United States* v. *Albanese,* 554 F.2d 543, 547 (2nd Cir. 1977); *Malone* v. *United States,* 502 F.2d 554, 556-557 (9th Cir. 1974), since they serve the dual purpose of prohibiting "behavior that is deemed dangerous to the restoration of the individual into normal society" and of providing the probation office "with information about the [probationer] and an opportunity to advise him." 408 U.S. at 478. For this same reason, this circuit has held an association condition identical to the one here in issue not to violate the freedom of association protection of the First Amendment. *United States* v. *Albanese,* 544 F.2d at 547. See also *Birzon* v. *King, supra,* holding that a condition requiring parolee not to associate with persons who have criminal records did not deprive a convicted person of his First Amendment right of freedom of association. 469 F.2d at 1243. ("On that basis, no one has questioned the Government's power totally to deprive a convicted person of his freedom of association").

Conditions concerning the associational rights of parolees and probationers have withstood other constitutional challenges. In this circuit such conditions have been held not to be unconstitutionally vague or overbroad. In *Birzon, supra,* parolee argued that the terms "associate" and "criminal record" contained in the condition "You shall not associate with persons with a criminal record unless you have the permission of your [parole] officer," were so uncertain as to infringe due process. The Second Circuit rejected parolee's argument on the grounds that the meaning of the term "associate" that "would more often occur to men of ordinary intelligence is something more than a fleeting or casual acquaintance" and the meaning of the term "criminal record" "would in any event be construed to refer to conviction of crime." 469 F.2d at 1243. Similarly, in *Albanese, supra,* probationer argued that the term "law-abiding" contained in the condition "You shall associate only with law-abiding persons. . . ," (the same condition in issue here), was vague and overbroad. Albanese had been observed from 1973 through 1976 on some forty occasions in the company of one or more individuals with criminal records, includ-

ing two of his codefendants. In determining whether these incidents fell within the parameters of the probation condition, the court distinguished the condition from the "criminal record" condition in *Birzon:*

> The words on their face, however, appear to involve quite different albeit frequently overlapping categories of persons. A person disobeying the law today and hence not being law-abiding may as yet have no criminal record, and a person with a past record may be entirely law-abiding today. Thus it would be preferable if conditions phrased in terms of 'law-abiding persons' were avoided when it is intended to proscribe association with persons having criminal records.

554 F.2d at 546. Nevertheless, the court held that the association condition clearly applied to Albanese's conduct. He had continually and consistently associated with many convicted criminals "on a more than casual basis" and these associations were "a 'calculated choice' on the part of appellant, a man with ready access to counsel as well as probation officers." 554 F.2d at 546-547. As a result, the court held the condition neither constitutionally vague nor overbroad as applied to the probationer.

A probation condition identical to the association condition here was also challenged by probationers in *United States* v. *Bonanno,* 452 F. Supp. 743 (N.D. Cal. 1978), on the ground that they did not have fair warning of which individuals they were prohibited from associating with. Probationers Joseph Bonanno and Salvatore Bonanno had met with convicted felons on at least nine occasions. While the court recognized that the language of the condition permitted the court or probation officer to exercise wide discretion in determining exactly what would be required of a probationer, 452 F. Supp. at 755; *Morrissey* v. *Brewer,* 408 U.S. at 479, the court held that absent sufficient explanation by a probation officer, the condition could only be applied to persons who are engaged in criminal activities contemporaneous with the association. The court suggested that:

> In explaining the "law-abiding persons" condition to the probationer, the probation officer ideally should specify the class of persons with whom the probationer may not associate. *This class, which should be reasonably related to the purposes of probation, might include persons who have been convicted of any criminal offense or only those convicted of certain offenses, or it might include persons who have been convicted at any time, or only those convicted within a certain number of years.* The prohibited class could also include persons encountered in certain employment, social, or other situations.

452 F. Supp. at 755-756 (footnotes omitted) (emphasis added). As to Joseph, the court found that he had read the condition, but that the plain terms of the condition were not further specified. Therefore he did not have adequate prior fair warning that associations with persons who had been convicted more than 12 years before were prohibited. As to Salvatore, the evidence revealed that one of his probation officers had explained that the association conditions of his probation and concurrent parole would encompass the standard conditions: "not associating with anybody with a prior criminal history unless granted permission by the Probation Officer to do so; and...not to associate with people involved in illegal activities." 452 F. Supp. at 758. The probation officer had testified that he had said that a brief, casual and unplanned contact would be permissible so long as reported and a long encounter which would be prohibited would also have to be reported. Based on a three to three and a half hour encounter in a restaurant with two individuals who had been convicted more than 12 years before the court found that, having been given adequate warning, Salvatore's failure to report the encounter was in itself a violation and that, in addition, the nature and duration of the encounters made them associations that were prohibited by the terms of probation, rather than mere casual contacts. 452 F. Supp. at 758.

Instructions by a probation officer which prohibit associations with a named individual under the probation condition

that "You shall associate only with law-abiding persons..." have been also upheld as within the scope of the probation officer's authority. In *United States* v. *Furukawa, supra,* the probation officer forbade probationer to associate with a Mr. Takagi after determining that Mr. Takagi appeared to be involved in "law-violating" activities. These law-violating activities consisted of reputed involvement with organized crime, dealings in pornography and an arrest for illegally possessing weapons. Based on this information, the Ninth Circuit Court of Appeals held that the instruction that Furukawa was not to associate with Takagi was consistent with the condition that he associate only with law-abiding individuals. The court therefore concluded that Furukawa's failure to obey the probation officer's instructions was a valid ground for finding that he violated a condition of his probation. 596 F.2d at 923.

While courts have permitted broad interpretations of probation and parole association conditions, they have been extremely hesitant to restrict associational rights in employment-related situations. In a *per curiam* opinion, the Supreme Court reversed a parole revocation which was premised upon on-the-job contacts with convicted individuals, stating that:

> We do not believe that the parole condition restricting association was intended to apply to *incidental contacts between ex-convicts in the course of work on a legitimate job for a common employer.* Nor is such occupational association standing alone, satisfactory evidence of nonbusiness association violative of the parole restriction. To so assume would be to render a parolee vulnerable to imprisonment whenever his employer, willing to hire ex-convicts, hires more than one. Absent a clear Parole Board directive to this effect, we cannot sustain the judgment of the Court of Appeals that on-the-job contact with fellow employees with police records is sufficient evidence of parole violation.

Arciniega v. *Freeman*, 404 U.S. 4 (1971). (Emphasis added). See also *United States* v. *Pastore*, 537 F.2d 675 (2nd Cir. 1976), where the judge imposed a condition on probationer that he resign as a member of the legal bar. In remanding the case for a hearing on the appropriateness of this condition, the Second Circuit noted that "there is a serious issue whether a federal judge, unguided by congress except in the most general terms, can require a defendant to give up a lawful occupation." 537 F.2d at 682.

Based on the discussion above, this court concludes that the association and travel conditions here at issue are reasonably related to the government's legitimate probation purposes, *Albanese*, 554 F.2d at 547, and that the association condition on its face does not deny probationer his right of freedom of association under the First Amendment or violate due process under the Fifth Amendment because of vagueness. *Albanese*, 554 F.2d at 547; *Birzon*, 469 F.2d at 1243. For the reasons stated below, the court finds that Mr. Pond's interpretations of the association and travel conditions were not overbroad or irrational or unreasonably related to the rehabilitation of the probationer and that Mr. Pond's explanations of the association condition gave probationer fair notice of what conduct was to be prohibited. *Furukawa*, 596 F.2d at 922-923; *Bonanno*, 452 F. Supp. at 755-756.

During Mr. Pond's first discussion with Mr. Curcio, Pond explained that the term "nonlaw-abiding persons" would include those individuals with criminal records, those involved in ongoing criminal activities who may not have a criminal record, and those on probation or parole, unless he had the permission of the probation office. He also explained that Albanese had been found in violation of the same association condition based on a pattern of association over an extended period of time with many individuals who had criminal records, whereas Conte had been found in violation of the condition based on two associations with individuals with criminal records. Such an explanation was well within the definition outlined in *Bonanno*, *supra*, and the holdings in *Albanese* and *Conte*, and was suffi-

cient to give the probationer fair notice that the term encompassed persons with prior criminal records as well as persons engaged in contemporaneous criminal activities. This is especially true given Mr. Pond's initial detailed explanation of the condition, his subsequent conversations with Curcio, the availability of counsel to further clarify the requirements and Mr. Curcio's own statements that he understood the condition completely.

At later dates Mr. Pond prohibited Mr. Curcio from associating with Mssrs. Mastro, Mengoulis, Pollina, Varvella and Vastano. Mr. Curcio was also warned that he could be found in violation of his probation by frequenting the North Main Street Social Club. These later instructions were well within Pond's authority as a probation officer and the parameters of the association condition. *Furukawa,* 596 F.2d at 922-923. All these men had prior criminal records[8] and had been arrested or con-

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[8]The following criminal records are based on evidence admitted at the probation revocation hearing. The court has disregarded any conviction which occurred more than ten years from the date that Mr. Curcio's probation commenced:

> *Louis Mastro:* Federal Felony Conviction for illegal gambling from Dec. 1971 - Jan. 1972; sentencing Oct. 12, 1972.
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> *Chris Mengoulis:* Bridgeport misdemeanor conviction for policy playing; sentencing Feb. 1974. Bridgeport misdemeanor conviction for frequenting a gambling house in April, 1973; sentencing Jan. 1973. Meriden conviction for gaming in Aug. 1971; sentencing Sept. 1971. Bridgeport misdemeanor conviction for frequenting a gambling house in Oct. 1970; sentencing Oct. 1970.
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> *Vincent Pollina:* Bridgeport misdemeanor conviction of gaming in Apr. 1976; sentencing Sept. 1976. Bridgepo misdemeanor conviction of using a telephone facility to transmit gambling information in March 1976; sentencing Sept. 1977. Bridgeport misdemeanor conviction of frequenting a gambling house in Oct. 1970; sentencing Oct.

victed with Curcio in the past.[9] Many of them frequented the Main Street Social Club on a regular basis. Consequently, the probation officer was justified in determining that these associations and Mr. Curcio's presence at the social club could interfere with Mr. Curcio's rehabilitation.

1970. Bridgeport misdemeanor conviction of frequenting a gambling house in 1969.

Louis Varvella: Bridgeport misdemeanor gambling conviction; sentencing Nov. 1978. Federal Felony Conviction for participation in the illegal gambling business from Dec. 1971 - Jan. 1972; sentencing Oct. 1976. Bridgeport misdemeanor conviction on two counts of Breach of the Peace in Sept. 1975; sentencing July 1976.

Thomas Vastano: New Haven misdemeanor conviction for gaming in Dec. 1969; sentencing Apr. 1971. Bridgeport misdemeanor conviction for frequenting a gambling house in Apr. 1970; sentencing July 1970. Bridgeport misdemeanor conviction in Feb. 1969; sentencing June 1971. Bridgeport misdemeanor conviction for frequenting a gambling house in Oct. 1970; sentencing Oct. 1970.

[9]The following arrest and conviction information is based on evidence admitted at the probation revocation hearing:

April 21, 1973 — Mr. Curcio was arrested with Mssrs. Mengoulis and Varvella.

August 7, 1971 — Mr. Curcio was arrested and later convicted of gambling with Mr. Mengoulis.

February 23, 1969 — Mr. Curcio was arrested with Mssrs. Menillo, Varvella and Vastano. He was later convicted.

December 19, 1966 — Mr. Curcio was arrested with Mssrs. Mastro, Menillo, Pollina and Vastano.

October 10, 1966 — Mr. Curcio was arrested with Mr. Vastano for gambling and later convicted.

Mr. Pond also acted reasonably and within the scope of the travel condition by requiring that Curcio seek prior permission and obtain a permit before traveling to New York to his tailor. Originally, the travel condition required that Curcio obtain permission before leaving the jurisdiction for any reason. However, once it was established that Curcio's job at Honeyspot Motors would involve travel to New York, New Jersey and Florida, the condition was modified to permit travel out of state for employment purposes with the condition that Curcio submit a list of the places to which he traveled. All other out-of-state travel still required prior approval and the issuance of a permit.

Both the requirement of obtaining prior permission and the requirement of obtaining a permit are standard procedures followed in probation offices. They are a means of providing the probation officer with information about the probationer and an opportunity to advise him, *Morrissey*, 408 U.S. at 478. This is especially important when the probationer seeks to travel outside the jurisdiction.

Here, the probation officer granted every request which Mr. Curcio made for out-of-state travel, with the exception of a request to travel to Las Vegas. He only asked that Curcio pick up a permit before departing. The court cannot understand how this could have placed an undue burden on the probationer or otherwise interfered with his traveling desires. The court therefore concludes that both the requirement that he obtain prior permission and that he obtain a permit were reasonable and within the scope of the travel condition.

Probationer's last contention is that the government has failed to prove that he violated the association condition or that he wilfully violated the travel condition. The court cannot agree. The evidence introduced at the probation revocation hearing not only demonstrates that probationer failed to make a good faith attempt to comply with the conditions as required under *United States* v. *Landay*, 513 F.2d 306, 308 (5th Cir. 1975), but clearly establishes that he wilfully, knowingly and flagrantly violated both conditions. This is true even if the court assumes

arguendo that (1) all contacts which Curcio had with nonlaw-abiding persons while at Honeyspot Motors and at Honeyspot diner were job-related under *Arciniega*, 404 U.S. at 4, that (2) all contacts which lasted less than twenty minutes were "a fleeting or casual acquaintance," *Birzon*, 269 F.2d at 1241, and that (3) Curcio only had fair notice that he was prohibited from associating with Mssrs. Mastro, Mengoulis, Pollina, Varvella and Vastano, and that frequenting the North Main Street Social Club he could be found to be in violation of his probation.

In support of Charge I of Probation Form No. 12 filed on September 12, 1978, Pond alleged that Curcio had associated with eighteen individuals on thirty-two dates. Of these associations, eighteen were alleged to have occurred at the Pizza Village Restaurant and ten at the North Main Street Social Club. Of the alleged Pizza Village associations, two occurred after Curcio was prohibited from associating with Chris Mengoulis: (1) On January 25, 1978, at 1:45 p.m., Curcio was observed entering the Pizza Village and sitting down at a table where Mengoulis was already seated. He was observed leaving with Mengoulis at 2:41 p.m. (Tr. July 31, 1979, 191-193); (2) on February 9, 1978 at 1:20 p.m., he was seen entering the Pizza Village with Mengoulis. Both men sat down together, had lunch, and left at 2:30 p.m. (Tr. July 31, 1979, 348-349).

Of the ten North Main Street Social Club associations, nine occurred after Curcio was prohibited from associating with Mssrs. Mastro, Pollina, Varvella and Vastano and after he was warned that by frequenting the club he could be found to be in violation of his probation.[10] Of these nine, four both exceeded twenty minutes and involved either Mr. Mastro, Pollina or Vastano: (1) on April 12, 1978, at 3:59 p.m. Curcio was observed arriving at the club with Mastro. Although Curcio left at 4:31 p.m., Mastro remained inside. (Tr. August 2, 1979, 555-557); (2) On April 13, 1978, Curcio was seen arriving at the club

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[10]Mr. Curcio was observed at the Main Street Social Club on April 7, 10, 11, 12, 13, 17, 18, 21 and 24, 1978.

at 5:38 p.m. Pollina was already inside. At 6:12 p.m., Pollina and Curcio left and got into a white and red car which ultimately arrived in the Bronx at Curcio's tailor's establishment; (Tr. August 2, 1979, 558); (3) On April 21, 1978, Curcio was observed at the club from 4:42 p.m. until 6:19. Vastano was there when Curcio arrived, but left at 5:07 p.m. (Tr. August 2, 1979, 417); (4) On April 24, 1978, surveillance began at 4:01. At that time, Mssrs. Curcio, Mastro and Pollina were already inside the club. Mastro was observed leaving at 4:38 p.m. Curcio at 4:59 p.m. and Pollina at sometime thereafter. (Tr. August 2, 1979, 427).

At the probation revocation hearing, probationer attempted to justify these visits as related to his job with Connecticut Amusements and Harley Enterprises, two vending machine businesses owned by his brother Gus Curcio. Both the Restaurant and the club leased machines from Gus' businesses. According to the testimony of his brother Vincent Curcio, Gus employed Mr. Curcio "to find new spots to put machines in new businesses and [to be] a good will ambassador or troubleshooter if something goes wrong," and to have "broken machines fixed and [deliver] commission checks every so many months." (Tr. Sept. 29, 1979, 1408). Vincent also explained that he, Vincent, was interested in purchasing the Pizza Village and that he had asked, but not paid, probationer "to help by going to Pizza Village at all different times of the day and evening to see how many people were at the bar, in the lounge and at the restaurant," because he "didn't trust the books." (Tr. Sept. 29, 1979 1415, 1455-1456).

The court does not credit this testimony. Agent Flynn, who was working in an undercover capacity at the Pizza Village, testified that Mr. Curcio was never seen emptying or fixing the vending machines or delivering commission checks. Moreover, both the length and regularity of Mr. Curcio's luncheons with Mr. Mengoulis and his visits to the small two room Main Street Social Club where at least one prohibited individual was present, leave no doubt that his associations were not related to his employment with Gus. Nor can the Court believe that they were

merely fleeting or casual acquaintances. These repeated associations followed specific warnings by Mr. Pond that probationer was not to associate with Mssrs. Mastro, Mengoulis, Pollina, Varvella and Vastano, all of whom had criminal records and had been previously arrested or convicted with Mr. Curcio. Each association varied in length from thirty-two minutes to one hour and ten minutes. If Mr. Curcio was uncertain about the nature of these contacts, he could have consulted with Mr. Pond, his probation officer, or Mr. Zeldes, his attorney, who was in contact with the probationer and Mr. Pond during the probation period. Instead, he made a calculated choice to violate the association condition of his probation.

In support of Charge II of Probation Form No. 12 filed September 12, 1978, Mr. Pond alleged that Mr. Curcio traveled into the Southern District of New York on three occasions: April 13, 1978, April 27, 1978 and June 23, 1978. On all three dates, Mr. Curcio visited the premises of his tailor without seeking prior permission from his probation officer, or obtaining a permit, all in violation of the travel condition of his probation. Although Mr. Curcio repeatedly insisted to Mr. Pond that he thought that he had blanket permission to travel to the tailor, the Court is unable to comprehend how he could have entertained such a belief. On at least seven occasions, three of which were prior to April, and the remainder of which were prior to June 23, Mr. Pond told Mr. Curcio that he did not have permission to travel to the tailor and that such travel required prior approval and the issuance of a permit. Curcio's failure to seek either permission or a permit therefore clearly violated the travel condition of his probation.

Because the Court finds that Mr. Curcio knowingly and wilfully violated both the association and travel conditions of his probation, the Court hereby holds that Mr. Curcio's probation must be revoked.

SO ORDERED.

/s/Ellen B. Burns
ELLEN BREE BURNS
UNITED STATES DISTRICT JUDGE

Dated at New Haven, Connecticut, this 15th day of October, 1980.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA :

v. : CRIMINAL NO B 74-48

FRANCIS G. CURCIO :

MEMORANDUM OF DECISION

On October 16, 1980, this Court revoked Francis G. Curcio's probation for knowingly and wilfully violating the association and travel conditions of his probation.[1] Curcio had been placed on probation on June 1, 1977, by Judge Robert C. Zampano of this Court as part of a sentence arising from his March 22, 1977 conviction upon a plea of nolo contendre to one count of a four-count indictment charging him with two counts of knowingly and wilfully making and subscribing United States Income Tax Returns which he did not believe to be materially true in violation of 26 U.S.C. § 7206(1) and charging his father Gustave Curcio with two separate counts of aiding and abetting probationer in violation of 26 U.S.C. § 7206(2). That sentence reads as follows:

> [T]he defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of three years. The sentence of imprisonment is suspended after service in a prison or jail-type institution for a period of five months. Thereafter, the balance of the sentence of imprisonment is suspended and the defendant is placed

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[1]Condition No. 2, the association condition, provided that "You shall associate only with law-abiding persons." Condition No. 4, the travel condition provided that "You shall not leave the judicial district without permission of the probation officer."

on probation for a period of five years. In addition, the defendant is fined the sum of $4,000. With respect to the fine, defendant is to stand committed until the fine is paid or he is otherwise discharged by due course of law.

(Tr. June 1, 1977 at 18).

As a general rule, where as here, a defendant is sentenced to a definite term of imprisonment with execution of sentence partially suspended and the defendant placed on probation, a court may, upon revocation of probation, require him to serve the remainder of the sentence imposed or any lesser sentence. 28 U.S.C. § 3653. In the present case, however, probationer argues that this Court may only require him to serve a maximum period of one month in a prison or jail-type institution, because any greater period of incarceration would violate the terms of the plea bargain agreement which he entered into with the government and which Judge Zampano approved and adopted. Because this Court concludes that Judge Zampano sentenced Curcio in accordance with the terms of the plea agreement, and because this Court further finds that the terms of the plea agreement do not apply to any postrevocation sentencing proceeding, the probationer's argument must be rejected.

I. THE FACTS

A. The March 22, 1977 proceeding

There is no question but that Curcio's conviction came about as the result of a plea agreement. That agreement was put on the record by Special Assistant United States Attorney Paul E. Coffey and elaborated on by the parties and the Court on March 22, 1977, during Judge Zampano's careful and thorough inquiry into both the issue of Attorney Jacob D. Zeldes' joint representation of the defendants, Francis G. Curcio and his father, Gustave Curcio, and the issue of probationer Curcio's desire to plead nolo contendre to Count One of the indictment. Since this Court considers the statements made by the parties and the

Court at that proceeding, as well as those made at and in connection with the June 1, 1977, sentencing proceeding to be central to the resolution of the present controversy, this Court will summarize both proceedings in detail.

Present at the March 22, 1977, inquiry were Judge Zampano, Special Assistant United States Attorney Coffey, Attorney Zeldes, probationer Francis Curcio and defendant Gustave Curcio. At the outset of the proceeding, Coffey suggested that the Court be informed of the plea agreement. Judge Zampano, after explaining to the defendants that the purpose of the proceeding was to determine whether a conflict exists which would prevent either one of them from receiving the advice, assistance and representation to afford them the quality of defense guaranteed by the Sixth Amendment, asked Coffey to do exactly that. (Tr. March 22, 1977 at 2). The following colloquy therefore transpired:

> MR. COFFEY: ...First, there is an agreement between the defense and the government that Francis G. Curcio will plea — or change his plea to Count One of the indictment. The plea profferred will be nolo contendre. I object to a nolo contendre plea. I should advise the Court that there are civil tax consequences to the particular years to which the change of plea is profferred.
>
> The government will dismiss Counts Two, Three and Four at the time of sentencing on Count One, and Counts Two and Four would mean that the case against Gustave Curcio will be dismissed altogether.
>
> *The government will agree to recommend a six-month ceiling of incarceration.*
>
> THE COURT: *I didn't hear that. Ceiling?*
>
> MR. COFFEY: Well, six months — *six months incarceration ceiling, and if the — if the Court at the time*

of sentencing or anytime prior thereto does — feels that that is not appropriate, it will advise the defense. And as far as the government's concerned, Francis Curcio shall be allowed to withdraw his plea if the Court feels that that's unacceptable as arranged between the parties.

THE COURT: *Was there a discussion on fine?*

MR. COFFEY: *No,* there's —

THE COURT: *And or probation? Terminal probation?*

MR. COFFEY: *There's no discussion — There's no discussion whatsoever on that point,* your Honor.

THE COURT: All right.

MR. COFFEY: I should point out specifically that *there is no agreement that the government — or obviously, the defendant will stand mute at sentencing.* And I want to advise the defense, as I have, that in all likelihood the government will probably argue that the Court ought to impose a six months incarceration. The defense is free of course to convince the Court otherwise.

(Tr. March 22, 1977 at 3-4). (emphasis added). Mr. Coffey also emphasized that this plea only resolved the charges contained in the indictment and explained the extent to which the case was not entirely an open file case. (Tr. March 22, 1977 at 4-5).

The Court, concerned about whether Attorney Zeldes' joint representation of the defendants created or would create a conflict which would prevent either defendant from receiving the advice, assistance and representation necessary to afford them the quality of defense guaranteed by the Sixth Amendment, then began an extensive inquiry into and explanation of the

matter of joint representation. The Court first sought Coffey's opinion as to whether he believed the quality of the evidence would indicate that there might be a conflict of interest. Although Coffey stated that he thought that there was a potential for conflict in light of the government's proof and Francis Curcio's possible testimony (which he proceeded to set forth and to evaluate), he concluded that he did not see a conflict (Tr. March 22, 1977 at 5-6). Judge Zampano then asked Mr. Zeldes to "address himself to, among any other things he would like to tell the Court, his previous client-lawyer relationship with the defendants, his prior consideration of the possible or potential conflict and what his view and considerations have been on this issue with the defendants." (Tr. March 22, 1977 at 6-7). After explaining the history of his representation of Francis Curcio in previous matters and the history of how he came to represent both defendants in this case, Zeldes informed the Court that he did not detect any personal hostility although "there is no doubt that one of the factors considered by Francis Curcio is the fact that his father is given some benefit." (Tr. March 22, 1977 at 8-9). Zeldes then summarized the agreement:

> "[T]he agreement is that the government will not oppose a setting of a *maximum period of incarceration of six months with the defendant reserving the right to argue for less or no incarceration at the time of sentence,* and that in the event that the Court is unable for any reason to accept the arrangement that counsel have talked about, that we would have the right to withdraw the plea on behalf of Mr. Curcio.

(Tr. March 22, 1977 at 9). (emphasis added).

After addressing Gustave Curcio and being told by him that he desired Zeldes to continue representing him, Judge Zampano addressed Francis Curcio:

> THE COURT: Now, Mr. Francis Curcio, you are in a somewhat different position, because, on the one hand, perhaps these plea negotiations are beneficial to

you — because if the Court accepts the negotiations, in addition to the other conditions, one is that *the Court would not sentence you to more than six months and — more than six months imprisonment, and it is open between zero days to six months.* So that it may be very appealing to you, on the other hand, you yourself must recognize whether the representation by Mr. Zeldes has favored more your father than you and that you feel satisfied with his representation, or if you wish to consult another attorney or retain another lawyer....

(Tr. March 22, 1977 at 10). (emphasis added). The Court then proceeded to ask probationer a series of questions to determine whether Curcio knowingly and voluntarily wished to have Mr. Zeldes represent both him and his father, and, whether he was satisfied that the plea negotiations benefited him despite the deal Zeldes had worked out for his father. (Tr. March 22, 1977 at 10, 11). After obtaining affirmative responses to both questions, Judge Zampano probed further:

THE COURT: In other words, I want to make sure that you are satisfied that the plea negotiations are helpful and beneficial to you?

DEFENDANT F. CURCIO: Yeah, I understand that, but —

THE COURT: But aside from the fact that your father is being released —

DEFENDANT F. CURCIO: That's one of the reasons we're doing this.

THE COURT: I know that. But is that the only reason you're doing it, or do you feel that, over all, it is something that you would accept if your father weren't in the case? See, I want to make sure that Mr. Zeldes' very fine representation of your father —

which involves walkiing out the door — hasn't injured you?

DEFENDANT F. CURCIO: No, no, it hasn't injured me, but —

MR. ZELDES: I think this probably best summarizes his view your Honor: That regardless of who his lawyer — regardless of who Francis' lawyer is, as long as — once his father was charged and joined in this case, that he would take the course of action he did; however, if his father were never joined in this case and were not a defendant, he very well might not be accepting this arrangement.

THE COURT: All right. Well, the former part of your statement is perhaps what I failed to articulate. If you had another attorney, are you telling the Court that you would tell your new attorney to accept these plea negotiations?

DEFENDANT F. CURCIO: Yes.

(Tr. March 22, 1977 at 11-12). The Court then found that both defendants had voluntarily and knowingly decided to be jointly represented by Mr. Zeldes, that it was unlikely that there would be a conflict if the case went to trial, that there was presently no conflict, and that the plea negotiations had been given full consideration with Francis Curcio in mind. (Tr. March 22, 1977 at 13).

Having completed his inquiry with regard to joint representation, Judge Zampano addressed Francis Curcio personally with respect to his decision to change his plea to Count One of the indictment to nolo contendre. The judge specifically advised Curcio of, and asked him a number of questions to determine that he understood, the nature of the charges in Count One, the effect of a plea of nolo contendre, the effect of the government's representations of its evidence, and the rights afforded

him by the constitution. The Court also queried him to determine the voluntariness of his plea. The following discussion ensued with respect to the plea agreement:

> THE COURT: Now, there have been certain proposals made to you in exchange for your nolo contendre plea, and *let me go over them to make sure that you agree those are the only proposals made to you.*
>
> First, that you would plead nolo contendre to Count One. Although the government objects, I will accept that nolo contendre plea because I, of course, recognize there is a possibility of civil tax consequences.
>
> Second, that Counts Three and Four will be dismissed. That as a result of the dismissals you (sic) father, Gus Curcio, will have all charges as set forth in the indictment dismissed as against him.
>
> *That the government will suggest to the Court that you not be sentenced to a period of incarceration which would exceed six months.* Which means, in effect, that your attorney and the pre-sentence report, and any other facts that may come to mind, and to be considered, *may convince the Court that sentence of incarceration less than six months would be appropriate.*
>
> *That no promises at all have been made to you on the possibility of the extent of the fine, if any, and on the term of probation.*
>
> So far, have I covered the agreements as you know them?
>
> DEFENDANT F. CURCIO: Everything.

* * *

THE COURT: *Now have any other promises been made to you by anyone, your attorney, any government agent, or by any person whatever, other than the ones I have mentioned?*

DEFENDANT F. CURCIO: *No.*

THE COURT: Do you understand that, with respect to the *period of incarceration,* if I *cannot* go along with that I will notify your attorney and you will have an opportunity to withdraw your plea of nolo contendre and you will have your plea of not guilty reinstated, do you understand that?

DEFENDANT F. CURCIO: Yes.

THE COURT: On the other hand, *if the Court does find with respect to the period of incarceration that the agreement is appropriate, you will be sentenced accordingly; do you understand that?*

DEFENDANT F. CURCIO: *Yes.*

THE COURT: Very well. Have I covered the agreements?

MR. COFFEY: Yes, you have, your Honor. *I should point out, so that Mr. Curcio will understand that the sentencing, the government is free to and — and will argue to the Court — that it impose that six months sentence, so that he won't be surprised.*

THE COURT: Yes. *The government is going to try to convince the Court that you should be incarcerated for the maximum of six months. Your attorney is going to try to convince the Court that you shouldn't receive any incarceration.* The Court will make its judgment based on what the government says, what your attorney says, what the pre-sentence report con-

tains and what other materials come before the Court; do you understand that, Mr. Curcio?

DEFENDANT F. CURCIO: Yes, sir.

THE COURT: Now, the *maximum sentence* you are exposed to is what?

MR. COFFEY: Is three years and $5,000 fine or both.

THE COURT: *Do you understand the maximum sentence in this case?*

DEFENDANT F. CURCIO: *Yes.*

(Tr. March 22, 1977 at 18-21). Coffey then set forth the factual basis for the plea. After making sure that probationer did not want to go to trial, the Court vacated Curcio's plea of not guilty on Count One and found that, if he were to plead nolo contendre, the plea would be made voluntarily. Curcio accordingly changed his plea and the Court entered a judgment of guilty on the record.

B. The June 1, 1977 Sentencing Proceeding

Prior to the June 1, 1977 sentencing of Francis Curcio, Attorney Zeldes submitted a report to Judge Zampano entitled "Comments on Behalf of Defendant Francis G. Curcio Relating to Sentencing." The purpose of the report was to "urge the Court to *impose* a *sentence* which does *not* include incarceration," Comments on Behalf of Defendant Francis G. Curcio Relating to Sentencing at 1, (emphasis added), and to persuade the Court to place the defendant on "conditional probation — the condition being the successful completion of a weight control program such as Dr. Kempner's Rice Diet Program or the Dietary Rehabilitation Clinic at the Duke University Medical Center." *Id.* at 12. In support of its recommendation, the defense cited the general principles of confinement and probation,

the crime itself, previous innuendo, Curcio's excessive weight problem and the sentences of other tax offenders in the District.

In discussing the general principles of confinement and probation, the defendant explained why a sentence not involving confinement was to be preferred to one involving "partial" or "total" confinement, why a sentence not involving "total" confinement was to be preferred in the absence of affirmative reasons to the contrary, and why probation was a desirable disposition. In reviewing the "sentences" imposed on tax offenders in the District, probationer stated that while "it is always difficult to compare sentences in criminal cases," he believed it appropriate "to point out that others in this District charged with this or more serious tax offenses have *not* always been incarcerated, particularly when there are extraordinary circumstances." Comments at 10. He then set forth the following examples of sentences *not* involving incarceration, which he felt "Certainly . . . justify a sentence without incarceration":

> *1. United States of America v. Eugene H. Dionne, No. 13,296.*
>
> The chairmen of the Board of Tax Review of the Town of Canton was fined $2,500 on a plea of guilty for failing to file an income tax return for 1967, after being charged with failing to file for 1967, 1968 and 1969. The Government dismissed, with the court's approval, the remaining two counts. Defendant was given two weeks to pay the fine.
>
> *2. United States of America v. Richard F. Duggan, No. H74/57.*
>
> Defendant, on a plea of nolo contendre to one count of a three count indictment alleging tax *evasion* was fined $500 and given an eighteen months suspended sentence and two years probation. The Government dismissed, with the court's approval, the

remaining two counts. Defendant was given two days to pay the fine.

3. United States of America v. Ida Ginsburg, No. 13,241.

Defendant, on a plea of guilty to one count of a seven count indictment alleging the felony of filing false returns, was placed on probation for one year and ordered to do thirty days of community work as a condition of probation and was given a six month suspended sentence and a $5,000 fine. The Government dismissed, with the court's approval, the remaining six counts. Defendant was given thirty days to pay the fine.

4. United States of America v. Franklyn H. Carrington, No. B-74-1.

A Bethany *certified public accountant,* who performed audits for the towns of Seymour, Oxford, Bethany and Woodbridge, was fined $2,000 for failure to file income tax returns for 1969, 1970 and 1971. The Internal Revenue Service claimed the gross income exceeded $250,000. The Government dismissed, with the court's approval, the remaining two counts. Defendant was given three days to pay the fine.

5. United States of America v. Salvatore C. Basso, No. B-75-4.

In this more recent case, Mr. Basso on a plea of nolo contendre was convicted of count two of two counts of the felony of tax evasion involving underreporting of $23,856 in taxable income and evading $9,610.23 in tax due the United States. In this case, also handled by the same prosecutor, this court imposed a suspended sentence and two years probation and a $4,000 fine. [The actual sentence imposed by

> Judge Zampano in open court on January 14, 1977 was: Imprisonment for three years on Count Two. Execution of sentence of imprisonment suspended forthwith and defendant placed on probation for two years. Fine of $4,000.00 on Count Two. Execution of fine stayed thirty days.] The Government dismissed, with the court's approval, the remaining count. Defendant was given thirty days to pay the fine.

Id. at 10-11. (emphasis in original).

At sentencing, Attorney Zeldes explained that in keeping with the plea arrangement, his purpose was "to urge [the court] to impose probation rather than something that the government and the defense talked about at the time the plea was entered." (Tr. June 1, 1977 at 2-3). Zeldes then proceeded to emphasize three points: the event itself, the imposition of other sentences in similar cases, and the physical situation and peculiar health problem facing Mr. Curcio. With regard to the second point, Mr. Zeldes stated:

> The second point I want to emphasize is that we're dealing with a tax event, and I would urge your Honor to recognize this in conjunction with other convictions, and I have set those out in the materials I gave you at page 11. But I would — 10 and 11 of the materials that I submitted to the probation officer, which I think your Honor had an opportunity to look at. But one case I think is particularly worth mentioning — and I should of course mention what I know your Honor is perhaps thinking, that it's always dangerous to compare defendants because we may be comparing apples and oranges, and there may be a lot of factors that I'm not aware of, but with that general caveat *I would urge your Honor to read the potential sentence in this case with the sentence in the case of United States against Salvatore C. Basso, B-75-4,* which is set out at page 11 of the materials I submitted. If your Honor please, there, there was a suspended sentence

and a fine, and there, the crime involved and this was a case prosecuted by the Strike Force Attorney Mr. Coffey — there the crime involved was more serious than we're dealing with.

As your Honor knows, the linchpin of tax enforcement in this country is the tax evasion statute, the more serious felony, not the false information statute that Mr. Curcio stands convicted of. This is a three-year maximum, the other is a five-year maximum. In the Basso case with claims of background similar to the claims of background involved here, this Court imposed a suspended sentence. It seems to me in the interests of uniformity of sentence, in the interests of the fact that the crime is less significant in the tutory (sic) structure, and perhaps in the event itself, although I'm not eminantly [sic] familiar with the Basso situation, but here in this case, if your Honor please, there is no element of intent to evade taxes, and of course is an element in tax evasion.

So that, obviously at least to the untutored eye, such as mine, it appears that the Basso matter is a more serious offense, and since a suspended sentence was imposed there, it seems to me that it's approriate to give the suspended sentence I urge here.

(Tr. June 1, 1977 at 6-8). The suspended sentence which Attorney Zeldes went on to urge was imposition of probation with a condition of probation being that Curcio enroll in the program at Duke Hospital promptly and successfully conclude it to the satisfaction of the hospital. (Tr. June 1, 1977 at 9-10). Thereafter, Judge Zampano commented on the substance of the presentence investigation report, expressed his opinion that "the evidence of guilt in this case is just overwhelming," and addressed the points made by the probationer. Concerning the sentences in other tax cases, the Court explained that:

> With respect to the second. . . [point] made by Mr. Zeldes, you mentioned the Basso case, I called for the pre-sentence report in Basso, and it is true I did sentence Mr. Basso to three years suspended, fine of $4,000 probation for four years on an income tax evasion charge on January 14, 1977. However, that case differs greatly from this one. In large part that case involved an upfront transaction concerning an insurance policy in which the government claimed the defendant's son was the named beneficiary but truly was the defendant who was getting the funds. And I think the cases are entirely different. The backgrounds of these individuals, particularly with respect to prior records, was different, and the government's recommendations differed.
>
> * * *
>
> For the reasons stated by Mr. Zeldes in his very comprehensive and extensive reporting to the Court in his usual thorough way, that doesn't bring the Court from six months to probation. *It brings the Court from a three-year sentence down to a shorter period of incarceration.* If it weren't for all the materials submitted to the Court weighing very heavily in favor of the defendant, and the government's own position in this case, this Court would never be thinking of six months for Mr. Curcio, we'd be talking two or three years.

(Tr. June 1, 1977 at 16-17). (emphasis added). The Court then imposed the sentence here in issue. No objection was made to this sentence by the defendant or his attorney at the disposition. Nor was it subsequently challenged under Rule 35 of the Federal Rules of Criminal Procedure by means of a motion for correc-

tion of sentence or reduction of sentence.[2] Instead, probationer began serving his sentence in accordance with its terms: On June 17, 1977 probationer voluntarily surrendered to Allenwood

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[2]Rule 35 of the Federal Rules of Criminal Procedure provides that:

> (a) *Correction of Sentence* — The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.
>
> (b) *Reduction of Sentence* — The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision.

Probationer indicated at oral argument that he is not challenging the sentence on the grounds that it is an illegal sentence or a sentence imposed in an illegal manner. Nor does the Court believe that such challenge would be justified. Since the sentence imposed by Judge Zampano is "legal on its face," *United States* v. *Malcolm*, 432 F.2d 809, 814 (2d Cir. 1970), not "in excess of or otherwise contrary to the applicable statute," *United States* v. *Huss*, 520 F.2d 598, 602 (2d Cir. 1975), and not "legally or constitutionally invalid in any other respect," *Hill* v. *United States*, 368 U.S. 424, 430 (1962), it could not be corrected as an illegal sentence under Rule 35. Since the 120 day time limit set forth in Rule 35 for correction of a sentence imposed in an illegal manner "is jurisdictional and cannot, under any circumstances, be extended by order of the court," *United States* v. *Ellenbogin*, 390 F.2d 537, 541 (2d Cir.), *cert. denied* 393 U.S. 918 (1968), *reh. denied* 399 U.S. 917, (1970), and that time limit has run, it cannot now be corrected as a sentence imposed in an illegal manner.

Prison; he was released on November 1, 1977. The $4,000 fine was paid on November 16, 1977.

C. The October 16, 1978 proceeding

The question as to the maximum length of incarceration to which the probationer could be subjected if he were found to be in violation of probation was only raised by Curcio after Probation Officer David Pond filed the first of a series of Probation Forms No. 12 charging him with violations of the association and travel conditions of his probation.[3] At the October 18, 1978, oral argument on the pre-revocation hearing motions, Mr. Zeldes first indicated that it was probationer's position that, even if there were a probation violation, the maximum period of incarceration which the Court could impose under the plea agreement was one month:

> MR. ZELDES: One reason why I think this [motion in the alternative to clarify the conditions of Curcio's probation] is particularly appropriate in this case, if your Honor please, and I'm not sure you'll remember the early history of this case. But at the time the plea was taken, your Honor may recall that this was a negotiated plea where Mr. Coffey represented the Government and it was agreed at that time that the

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[3]On September 12, 1978, Probation Officer Pond filed Probation Form No. 12 charging that:

> I. From November 1977 through April 1978, probationer Curcio is alleged to have associated with eighteen non-law abiding persons on thirty two dates...all in violation of Condition No. 2 of the Conditions of Probation...
>
> II. On three separate occasions, without the permission of his probation officer, probationer left the Judicial District of Connecticut and traveled into the Southern District of New York, ...all in violation of Condition No. 4 of the Conditions of Probation...

> *maximum period of incarceration* would be six months. That period of incarceration was not completely served but five months of it were served pursuant to your judgment, if your Honor please, and that has already been done so what we're talking about is a violation if there were to be a violation is sending Mr. Curcio back to prison for additional period of a month to serve the maximum period of incarceration that the parties agreed upon and that the Court approved in the sentence that was imposed.

(Tr. Oct. 16, 1978 at 12).

Mr. Casey, in his argument on behalf of the government, refuted the probationer's interpretation of the effect of the plea bargain agreement on any post probation revocation proceeding, stating:

> ...I was somewhat amazed quite frankly to hear Mr. Zeldes give his interpretation of the plea negotiations which were entered into originally on this case. And his feeling that even if this court were to revoke Mr. Curcio's probation, it could at most resentence him to a one-month term of imprisonment.
>
> That, of course, is not the position of the Government. The position of the Government is that the Court could resentence or send Mr. Curcio back to prison to serve all of his sentence, that being the remainder of the I believe three-year sentence that was originally imposed by the Court. The Government does not believe that either we or the Court is bound by the initial negotiation and that probation revocation is certainly a horse of a different color.

(Tr. Oct. 16, 1978 at 12).

Judge Zampano, however, declined to decide the issue, explaining that he'd face it if and when Mr. Curcio's probation

were revoked. (Tr. Oct. 16, 1978 at 33). This Court, having revoked probationer Curcio's probation, must therefore make a determination, prior to sentencing, as to the maximum period of incarceration which it may require the probationer to serve, if it concludes confinement to be appropriate.

II. DISCUSSION OF LAW

In *Santobello* v. *New York*, 404 U.S. 257, 260-261 (1971), the United States Supreme Court formally recognized plea bargaining as "an essential component of the administration of justice" which properly and fairly administered was highly desirable and worthy of encouragement. In *Santobello, supra,* the defendant, who had been charged with two felony counts, pleaded guilty to a lesser-included offense in exchange for the prosecutor's promise to make no recommendation as to sentence. At his sentencing, a prosecutor, who was new to the case and ignorant of his colleague's commitment, recommended the maximum one-year sentence. Defense counsel immediately objected and requested an adjournment of the sentencing, but the judge refused to grant the adjournment and proceeded to impose the maximum one-year sentence, because he was "not at all influenced by what the District Attorney says." 404 U.S. at 259. On certiorari, the Supreme Court, emphasizing that plea bargaining and "the adjudicative element inherent in accepting a plea of guilty must be attended by safeguards to insure the defendant what is reasonably due in the circumstances," *Id.* at 262, explained that:

> [while] those circumstances will vary,...a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.

Id. at 262. The Court therefore held that the defendant was entitled to relief under the plea agreement despite the inadvertence of the prosecutor's breach and the trial court's statement that it was not influenced by the prosecutor's recommendation.

Since *Santobello*, the lower courts have consistently required strict adherence to the "specific" and "express" terms and conditions of plea agreements reached between the government and defendants. *United States* v. *Avery*, 621 F.2d 214, 215-216 (5th Cir. 1980); *United States ex rel. Robinson* v. *Israel*, 603 F.2d 635, 637 (7th Cir. 1979); *Bergman* v. *Lefkowitz*, 569 F.2d 705, 716 (2nd Cir. 1978). See also *United States* v. *Johnson*, 582 F.2d 335, 337 (5th Cir. 1978) (distinguishing *United States* v. *Ewing*, 408 F.2d 1141 (5th Cir. 1973) on the facts). However, in attempting to enforce such agreements, the courts have been faced with the recurring problem of imprecise language used by the parties in the plea bargaining process. *United States* v. *Crusco*, 536 F.2d 21, 23 (3d Cir. 1976). To resolve this problem, the courts have therefore looked to the record to determine the "circumstances as they existed at the time of the guilty plea, *judged by objective standards,*" *Id.* at 24, quoting *Mosher* v. *Lavallee*, 491 F.2d 1346, 1348 (2d Cir.), *cert. denied* 416 U.S. 906 (1974) (emphasis in original); *see also United States ex rel. Curtis* v. *Zelker*, 466 F.2d 1092 (2d Cir. 1972), to decide what was "reasonably understood by [the defendant] when he entered his plea of guilty." *United States* v. *Crusco, supra*, 536 F.2d at 27. See also *Blake* v. *United States*, 372 F. Supp. 186 (M.D. Fla. 1973) (similar claim as here).

In the instant case, probationer argues that reincarceration under 18 U.S.C. § 3653 for more than one month would violate the terms of his plea agreement because, under the agreement, the government obligated itself to recommend an absolute maximum sentencing ceiling of six months incarceration for his 26 U.S.C. § 7206 conviction and the Court agreed to sentence him accordingly or afford him an opportunity to withdraw his plea. In reviewing the record by objective standards to determine what Curcio could have reasonably understood to be encompassed in the plea agreement, this Court finds that under the terms of the agreement, the government only obligated itself to recommend a six month maximum incarceration ceiling with regard to the original sentencing and not with respect to any possible resentencing under 18 U.S.C. § 3653 upon revocation of probation, and, that the judge complied with the terms of the

plea agreement by imposing a sentence of three years imprisonment, execution of the sentence suspended after five months incarceration and payment of a $4,000 fine, followed by five years probation. Since the original sentence complied with the terms of the agreement, the Court may therefore require the probationer to serve the remainder of that sentence or any lesser sentence. 28 U.S.C. § 3653.

Throughout the March 22, 1977, proceeding the government, the defense attorney and the Court in discussing the terms of the plea agreement referred to the six month ceiling as being a six month maximum ceiling on incarcerationi or imprisonment, not on sentence, which the Court could reject by advising the probationer "at the time of sentencing or anytime prior thereto" that it did not feel the ceiling appropriate, (i.e. Tr. March 22, 1977 at 3), and which the government at sentencing would be free to argue should be imposed. (i.e. Tr. March 22, 1977 at 20). In fact, on the one occasion where the judge referred to the six months as being a limit on the sentence, he corrected himself, stating:

> . . . the Court would not sentence you to more than six months — more than six months imprisonment, and it is open between zero days to six months.

(Tr. March 22, 1977 at 10). Moreover, it is clear from the record that the maximum "sentence" under the agreement was not limited to a straight six-month period of incarceration. In response to the Court's questions as to whether there was a discussion on fine, probation or terminal probation, the government replied that "there's no discussion whatsoever on that point . . ." (Tr. March 22, 1977 at 4). The Court, also, in reviewing the terms of the agreement with the probationer expressed its understanding of the agreement to mean "[t]hat no promises at all have been made to you on the possibility of the extent of the fine, if any, and on the term of probation," (Tr. March 22, 1977 at 19), and Curcio affirmed that understanding. When asked if any other promises had been made to him by anyone, other than those which the judge mentioned, Curcio answered

"No." (Tr. March 22, 1977 at 20). Finally, after explaining to the probationer that the government would try to convince the Court that he should be incarcerated for the maximum of six months, that his attorney would try to convince the Court that he should not receive any incarceration, and that the Court would make its judgment based on what is said, what the presentence report contains, and what other materials come before the Court, Judge Zampano instituted the following colloquy concerning the "maximum sentence":

> THE COURT: Now, the maximum sentence you are exposed to is what?
>
> MR. COFFEY: Is three years and $5,000 fine or both.
>
> THE COURT: Do you understand that is the maximum sentence in this case?
>
> DEFENDANT F. CURCIO: Yes.

(Tr. March 22, 1977 at 21).

Probationer's understanding of the agreement was further clarified preliminary to and during the June 1, 1977, sentencing proceeding. Prior to that proceeding probationer submitted a report relating to sentencing, the purpose of which was the "urge the Court to *impose a sentence* which did *not* include *incarceration,*" Comments on Behalf of Defendant Francis G. Curcio Relating to Sentencing at 1, (emphasis added), and, to persuade the Court to place the defendant on "conditional probation — the condition being the successful completion of a weight control program." *Id.* at 12. Among the materials submitted in support of his position, was a summary of sentences imposed in other tax offenses in the district which probationer referred to as *not* involving incarceration and which probationer felt "certainly...justify a sentence without incarceration" in this case. *Id.* at 10-11. Of the five examples set forth, two involved the imposition of sentences of imprisonment in excess of

six months, the execution of which had been suspended and defendants placed on probation for two years and fined. *(United States* v. *Duggan,* No. H 74/57 - eighteen months and *United States* v. *Basso,* No. B-75-4 - three years). One involved the imposition of a six-month sentence of imprisonment, the execution of which was suspended and defendant placed on probation for one year and fined. *(United States* v. *Ginsburg,* No. 13,241). And two involved only fines. *(United States* v. *Dionne,* No. 13,296 and *United States* v. *Carrington,* No. B-74-1). At sentencing, probationer's attorney urged the Court to look at these cases, and to particularly note the suspended sentence and fine imposed in *Basso.* Because a suspended sentence was imposed in *Basso,* Zeldes believed a suspended sentence and probation appropriate in this case with a condition of probation being that Curcio enroll at Duke Hospital. Zeldes, however, did not ask the Court to limit the length of the "sentence" which it should impose, the execution of which was to be suspended. Nor did he suggest a particular length of "sentence" or, mention to the Court that the length of Basso's suspended sentence was three years. Instead, Zeldes referred to such sentences as instances where others in this District charged with similar or more serious crimes were *not* incarcerated.

In light of the fact that not only the Court and the government but Mr. Zeldes himself made a distinction between the terms "sentence" and "incarceration," that Mr. Zeldes interpreted a sentence of incarceration, the execution of which had been suspended, not to be a sentence involving incarceration, that Mr. Zeldes urged the Court to impose a suspended sentence and probation, and that the specific and express terms of the plea bargain agreement did not cover the possibility of a fine or probation, this Court finds it difficult to believe how under the circumstances the probationer could have reasonably interpreted the plea agreement to place an absolute six-month maximum ceiling on the length of incarceration which the Court could impose at both the original sentencing *and* any possible postrevocation sentencing. While there may be a superficial appeal to the probationer's argument, there is simply no basis for it in the record.

This Court also considers it significant that under the Probation Act, 18 U.S.C. § 3651, which is the sole source of the federal court's probationary powers, a federal district court has no authority to place a defendant on probation without also suspending the imposition or execution of sentence. *United States* v. *Cohen,* 617 F.2d 56, 58 (4th Cir.), *cert. denied* 101 S. Ct. 130 (1980); *United States* v. *Workman,* 617 F.2d 48, 50 (4th Cir. 1980); *United States* v. *Ellenbogen,* 390 F.2d 537, 541 (2d Cir.), *cert. denied* 393 U.S. 918 (1968), *reh. denied* 399 U.S. 917 (1970); *Affronti* v. *United States,* 350 U.S. 79, 80 (1955); *Ex parte United States,* 242 U.S. 27 (1916). Under the Act, upon entering a judgment of conviction, a district court may suspend the imposition or execution of sentence and place a defendant on probation, or, if the maximum punishment for the offense is more than six months, the Court may impose a sentence "in excess" of six months and provide that the defendant be confined for a period "not exceeding" six months and that the execution of the remainder of the sentence be suspended and the defendant placed on probation.

It is apparent from both the report submitted with regard to sentencing and the June 1, 1977 sentencing record that probationer's counsel, an experienced criminal attorney, was aware of the requirements of the Probation Act. In his report on sentencing probationer specifically stated that "[t]he purpose of this report is to urge the Court to *impose a sentence* which does *not* include *incarceration,*" Comments at 1, (emphasis added) and to persuade the Court to place the defendant on "conditional probation — the condition being the successful completion of a weight control program." *Id.* at 12. At sentencing, Zeldes asked the Court to give his client a suspended sentence and probation. Zeldes also pointed out in the report that under the general principles of confinement and probation, probation is the most desirable disposition and a sentencing involving "partial" confinement is to be preferred over one involving "total" confinement. If Zeldes desired to enter an agreement as to probation or the length of the suspended sentence which he was seeking, he could and should have done so. Having failed to expressly and specifically incorporate such terms in the agreement, it cannot

be said that the Government or Court is bound by the probationer's alleged subjective understanding of the agreement.

This case is readily distinguishable from *Crusco, supra.* There, the defendant pleaded guilty to one count of a two count indictment in exchange for a maximum "sentence" of seven years and the prosecutor's promise to take no position on sentencing. At sentencing the district court sentenced the defendant to six years "imprisonment" with an additional three year special parole as required by statute. Immediately, the defendant sought to withdraw his guilty plea stating that he was under the impression that the maximum he could get was four years imprisonment and three years special parole. On appeal, the Third Circuit Court of Appeals found that, although the record revealed that the trial judge conscientiously explained the operation of "special parole," it also revealed that the defendant could have reasonably understood the promised maximum sentence of seven years to encompass the three-year special parole term rather than the special parole term being in addition thereto. The Court reached this conclusion, because:

> . . . neither the government nor the district judge specified that the maximum sentence of *confinement* would be seven years. Rather, both spoke in the broader term of *sentence* and not *confinement.* Black's Law Dictionary 1528 (4th ed. rev. 1968) defines sentence as '[t]he judgment formally pronounced by the court upon the defendant after his conviction in a criminal prosecution, awarding the punishment to be inflicted.' (emphasis supplied). The definition clearly encompasses a special parole term.
>
> In addition, as any sentence imposed under section 841(b) must include the special parole term, a seven year sentence thereunder may reasonably be construed to consist of four years' imprisonment and three years special parole. We are persuaded that [the defendant] reasonably could have misunderstood the length of time he would be subject to Government

> custody and supervision under a sentence 'not to exceed seven years.'

536 F.2d at 24. (emphasis in the original).

This Court also believes the other cases cited by probationer in his memorandum to be distinguishable on the facts. Even in *United States* v. *Ewing*, 480 F.2d 1141, 1143 (5th Cir. 1973), where the court applied the terms of the plea agreement to a subsequent hearing on defendant's motion for the reduction of sentence under Rule 35 of the Federal Rules of Criminal Procedure, the court explained that the distinction between these two proceedings was of "little import because both of these proceedings were integral parts of the sentencing process *in this case.*" (emphasis suplied). Moreover, in *United States* v. *Johnson*, 582 F.2d 335, 337 (5th Cir. 1978), the court, in rejecting defendant's claim that the government broke its promise not to make a sentence recommendation when it opposed his Rule 35 reduction of sentence motion, explained that:

> *United Stated* v. *Ewing, supra,* does not give the defendant the right to prevent an unopposed Rule 35 motion. The government violates *Ewing* only when its opposition violates the essence of the plea agreement.

Even assuming *arguendo* that the government and the Court would have been bound by the plea agreement at a subsuquent Rule 35 proceeding, it does not follow that they are bound by the agreement at a postrevocation sentencing hearing. In a criminal case, a prosecution ends when sentence is imposed. *Bradley* v. *United States*, 410 U.S. 605 (1973). Although it is true that where imposition of sentence has been deferred subject to probation, it has been held that a subsequent combined revocation and sentencing hearing is a stage of a criminal proceeding where substantial rights of a criminal accused may be affected, *Mempa* v. *Rhay*, 389 U.S. 128 (1967), it has also been held that where sentence has been imposed, the execution of which has been suspended and defendant placed on probation, the revocation

of probation is not a part of a criminal proceeding. *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973). Here, sentence was imposed on June 1, 1977, and no appeal was taken therefrom. The prosecution consequently ended on that date. Any plea agreement, unless specifically and expressly covering any subsequent noncriminal proceeding, therefore cannot be construed to apply to any post probation revocation sentencing.

Because this Court concludes that Judge Zampano sentenced Curcio in accordance with the terms of the plea agreement, and because the Court also finds that the terms of the plea agreement do not apply to any postrevocation sentencing proceeding, this Court holds that it may, if found appropriate, require the probationer to serve the remainder of the three-year sentence imposed by Judge Zampano or any lesser period.

SO ORDERED.

/s/ Ellen Bree Burns
ELLEN BREE BURNS
UNITED STATES DISTRICT JUDGE

Dated at New Haven, Connecticut, this 26th day of June, 1981.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA
V. DOCKET NO. B-74-48
FRANCIS CURCIO

ORDER IMPOSING SENTENCE

Pursuant to the memorandum of decision issued by the Honorable Ellen Bree Burns dated October 16, 1980 revoking the Probation term of Francis Curcio.

IT IS ORDERED that the defendant be committed to the custody of the Attorney General for two years. A stay of execution is granted until July 14, 1981 or until specific designation is made by the Federal Bureau of Prisons.

/s/ Ellen B. Burns

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 15th day of September, one thousand nine hundred and eighty-one

Present: HON. THOMAS J. MESKILL
HON. AMALYA . KEARSE, CJJ.
HON. HOWARD T. MARKEY, U.S.C.C. & P.A.

Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. 81-1275

FRANCIS CURCIO,
Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the defendant-appellant. Francis Curcio

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ A. Daniel Fusaro
A. DANIEL FUSARO, Clerk

Second Circuit Rule 27 (a) governing use of this form is reprinted on reverse.
Note requirement that lower court opinion or agency decision be attached.

UNITED STATES COURT OF APPEALS FOR
THE SECOND COURT

UNITED STATES OF AMERICA
V.
FRANCIS CURCIO

Use short title

MOTION BY: (Name and tel. no. of attorney in charge)

Thomas S. Luby, Esq.
(203) 773-2108/FTS: 645-2108

Has opposing counsel consented?	☐ Yes	☑ No
Has service been effected?	☑ Yes	☐ No
Is oral argument desired?	☐ Yes	☑ No

(Substantive motions only)
Requested return date:
(See Second Circuit Rule 27(b)
Date of argument of appeal, if scheduled:

Judge or agency whose order is being appealed:

81 1275

Docket Number

NOTICE OF MOTION

state type of motion

for expedited issuance of.....
mandate

OPPOSING COUNSEL: *(Name and tel. no. of attorney in charge)*
Jacob Zeldes, Esq.

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL
Has request for relief been made below?

(See F.R.A.P. Rule 8.) ☐ Yes ☐ No

Would expedited appeal eliminate need for this motion?
☐ Yes ☐ No

If no explain why not.

Brief statement of the relief requested: The Government requests that the mandate in this case be issued forthwith.

Previous requests for similar relief and disposition: None

Statement of the issue(s) presented by this motion: Whether the standard 21-day delay for issuance of the mandate pursuant to Rule 41 should be reduced and the mandate issued forthwith.

Brief statement of the facts *(with page references to the moving papers):* Oral argument was held on August 12, 1981 on appellant's challenges to his probation revocation and the imposition of a two year sentence by U.S. District Judge Ellen Burns.

A summary affirmance was filed on the same day. Appellant Curcio is currently at large and has already been designated by the Bureau of Prisons. The Government regards the appellant as a serious threat to the safety of the community.

Summary of the argument *(with page references to the moving papers):* The Appellant's arguments on appeal were rejected summarily by this Court on August 12, 1981. The Government regards the appellant as an incorrigible criminal who presents a serious threat to the public safety. He is a convicted felon. His original offense related to the disguising of gambling and loan shark earnings on his federal tax return. He has been found guilty of repeated, blatant probation violations. Furthermore, as indicated by the enclosed papers, he has recently been engaged again in loan shark activities. (See accompanying affidavit and appendices.) Accordingly, the Government requests that the mandate be issued immediately.

8/18/81 /s/ Thomas S. Luby

Date The name signed must be printed beneath

THOMAS S. LUBY, Assistant U.S. Attorney

ORDER

Kindly leave this space blank.

IT IS HEREBY ORDERED THAT THE MOTION

Be and it hereby is granted ~~denied.~~

/s/ Thomas J. Meskill
THOMAS J. MESKILL

/s/A. L. Kearse by T.J.M.
A. L. KEARSE BY T.J.M.

/s/H. J. Markey by T.J.M.
H. J. MARKEY BY T.J.M.

9/15/81